

### **BULKY DOCUMENTS**

(Exceeds 100 pages)

| Procee | eding/Serial No: | 91182064 |
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| Filed: | 1/20/2011        |          |

Title: MOTION FOR RECONSIDERATON OF THE BOARD'S DECEMBER 20, 2010

Part 1 of 1

91182064

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# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

AS HOLDINGS, INC.,

Opposer,

Opposition No. 91182064

-vs
Serial No. 76/461,157

H&C MILCOR, INC., f/k/a/

AQUATICO OF TEXAS, INC.,

Applicant.

#### NOTICE OF FILING

TO: Terence J. Linn, Esq.
Van Dyke, Gardner, Linn & Burkhart, LLP
2852 Charlevoix Drive SE, Suite 207
Grand Rapids, MI 49588-8695

PLEASE TAKE NOTICE that on the 20th day of January, 2011, we filed with the United States Trademark Trial and Appeal Board, Attention: George C. Pologeorgis, Interlocutory Attorney, APPLICANT, H&C MILCOR, INC.'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECEMBER 20, 2010 DECISION UNDER 37 CFR 1.127(b) AND REQUEST TO THE BOARD UNDER 37 CFR 2.127(c) with accompanying APPENDIX, a copy of which is attached hereto.

Dillis V. Allen

Attorney for Applicant

Reg. No. 22,460

#### CERTIFICATE OF SERVICE

This is to certify that on January 19, 2010, Applicant, H&C Milcor's Motion for Reconsideration of the Board's December 20, 2010 Decision under 37 CFR 2.127 and Request to the Board under 37 CFR 2.127(c) with accompanying Appendix and Notice of Filing, was sent via Federal Express to the Trademark Trial and Appeal Board, 600 Dulany Street, Room 37A, Alexandria, VA 22314, and a true and correct copy of said Motion for Reconsideration and Request to the Board with accompanying Appendix and Notice of Filing was sent via Federal Express on January 19, 2011 to Opposer's counsel as follows:

Terence J. Linn, Esq. Van Dyke, Gardner, Linn & Burkhart, LLP 2851 Charlevoix Drive SE, Suite 207 Grand Rapids, MI 49588-8695

Dillis V. Allen

Dillis V. Allen, Esq. 105 S. Roselle Road Suite 101 Schaumburg, IL 60193 847/895-9100

### IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| AS HOLDINGS, INC.              | )   |
|--------------------------------|---|
| Opposer,                       | )<br>)<br>) Opposition No. 91182064                     |
| -vs-<br>H&C MILCOR, INC. f/k/a | ) Serial No. 76/461,157<br>) Mark: Miscellaneous Design |
| AQUATICO OF TEXAS, INC.,       | <pre>) (Pipe Boot Product Design) )</pre>               |
| Applicant.                     | j   |

APPLICANT, H&C MILCOR, INC.'S MOTION FOR RECONSIDERATION
OF THE BOARD'S DECEMBER 20, 2010 DECISION UNDER
37 CFR 2.127(b) AND REQUEST TO THE BOARD UNDER
37 CFR 2.127(c)

#### I. INTRODUCTION

This is a Motion for Reconsideration of the Board's December 20, 2010 Decision under 37 CFR 2.127(b) striking certain of Applicant's Trial Exhibits, namely Exhibit 16 and parts of Exhibits 20 and 21 and the related testimony of Applicant's trial witnesses Sean Steimle and Larry Devitt based upon the failure of Applicant to produce these Exhibits in response to the Opposer's broad document discovery request, but without considering Applicant's objection to this request(Appl.App.p.60), for "All documents and things referring or relating to third-party use of the Applicant's Mark." (Req. No. 21, Appl.App.p.48).

This is also a request for the Board to hear the Motion rather than the Interlocutory Attorney.

### II. REQUEST FOR THE BOARD TO HEAR THIS MOTION UNDER 37 CFR 2.127(c)

Applicant requests that the Trademark Trial and Appeal Board hear this Motion, rather than the Interlocutory Attorney, under the provisions of 37 CFR 2.127(c) which permits either a single Board member or alternatively an Interlocutory Attorney to decide the pre-trial motions. Because of the significant prejudice to the Applicant resulting from the striking of Exhibit 16 and portions of Exhibits 20 and 21, and the clear error of fact by the Interlocutory Attorney in relying on Opposer's Document Request No. 21 to strike these Exhibits, Applicant believes this request necessary. This procedure is not unlike the Federal Rules procedure of appealing a Magistrate's ruling to the referring Federal District Judge.

Applicant asks that this request be granted.

#### III. BACKGROUND

Opposer's Motion to Strike(Appl.App.p.71) was filed on December 9, 2009, and at a hearing on April 29, 2010, the Interlocutory Attorney requested copies of Opposer's discovery requests -- but did not request Applicant's responses to those requests.

The December 20, 2010 Board Decision, apparently written by the Interlocutory Attorney, gives no reasons for striking the three Exhibits, but during the second telephonic hearing on the Motion on December 20, 2010, the Interlocutory Attorney held that the striken portions of Exhibits 16, 20 and 21 should have been produced by Applicant in discovery in response to Opposer's document Request No. 21, which requests ""All documents and things referring or relating to third-party use of the Applicant's Mark."(Appl.App.p.48), Since the Interlocutory Attorney did not request any of Applicant's responses, he did not know, except for Applicant's oral argument, when the Decision was made on December 20, 2010, that Applicant had objected in its Responses to Opposer's Request No. 21: "Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced." (emphasis added) (Appl.App.p.60). After Applicant's objection, the Opposer never filed a motion to compel Request No. 21. plicant did provide Opposer, in response to document Request No. 21, exemplary invoices to the companies that Portals Plus(a subsidiary of Applicant) did private labeling for, including Firestone.

The striken Exhibits include:

Exhibit 16(Appl.App.p.2-3) is two photographs of the tool owned by Portals Plus(Applicant) used to make the lettering "BFDP EPDM" on the Exhibit 4 Firestone pipe boot.

Exhibit 20(Appl.App.p.23-25) is a Firestone specification of the Exhibit 4 pipe boot with related Portals Plus correspondence almost identical in substance with Defendant's Exhibit 14.

Striken page 23(Appl.App.p.23) is a fax from Ronald Resech at Portals Plus to Firestone relating to the drafts and transmittal of the specification to Firestone.

Striken page 25 is a letter from Ronald Resech at Portals Plus to Firestone transmitting pipe boot samples to Firestone.

Exhibit 21(Appl.App.p.26-35) is a Firestone specification generated in part by Portals Plus also contained in Defendant's Exhibit 14.

Striken page 26(Appl.App.p.26) is a product specification sheet of Firestone "reviewed by Larry Devitt" a Portals Plus employee and one of Applicant's trial witnesses.

Striken pages 33 to 35(Appl.App.p.33-35) are a plurality of emails between Larry Devitt and Firestone relating to samples and specifications to Firestone.

Striken page 36(Appl.App.p.36) is a letter from Ronald Resech at Portals Plus to Firestone regarding a "distribution binder" and samples.

All these Exhibits were introduced by the Applicant to show that the Firestone pipe boot, copied and reverse engineered by the Opposer, AS Holdings, was not only made by Applicant -- the Firestone specification given by Firestone to the Opposer for copying, was also authored by Applicant.

#### IV. OPPOSER'S PRE-FILING ACTIVITIES

This case is in part about the Opposer's pirating the Applicant's pipe boot, millimeter by millimeter, when it contracted for its tooling without a single engineering drawing generated by the Opposer. The Opposer sent one of Applicant's pipe boots to its tooling sub-contractor for copying. Opposer has known Applicant's position on this issue since Applicant's discovery depositions of Opposer's employees on November 12 and 13, 2008.

A sample was given to the Opposer by Firestone pursuant to Firestone's request for a production quotation. But Firestone did not design or manufacture the sample pipe boot(Exh.4)(Appl.App.p.1), it was made by Portals Plus for Firestone. And not only did Portals Plus make pipe boots for Firestone, it authored the Firestone specification (Exh.14) already in the record.

The striken parts of Exhibits 20 and 21 are merely transmittals and discussions between Portals Plus and Firestone relating to the Firestone specifications and samples from Portals Plus to Firestone.

Striken Exhibit 16(Appl.App.p.2,3) is a mold insert used to make the Firestone pipe boot, Exhibit 4.

All these striken Exhibits tend to show and were introduced by Applicant to show that all the technology pirated by the Opposer when it sent the Firestone pipe boot to its tool maker in Michigan -- originated at Portals Plus -- and not Firestone.

All this is further evidenced by the Opposer's own employees who testified on November 12 and 13, 2008, in Elkhart, Indiana, that the Opposer did not even have an Engineering Department, and the transcripts and Exhibits from these depositions have already been admitted as trial evidence under a stipulation of the parties.

# V. SINCE OPPOSER FILED NO MOTION TO COMPEL, IT IS BARRED FROM RELYING ON DOCUMENT REQUEST NO. 21

Applicant objected to Opposer's document Request No. 21 for "All documents and things referring or relating to third-party use of the Applicant's Mark" on the grounds it was too broad. Opposer never filed a motion to compel Re-

quest No. 21 to obtain more documents than the ones produced. Thus, the Opposer should be barred, as well as the Board, from relying on Applicant's failure to produce these Exhibits during discovery.

VI. RULE 2.121(e) DOES NOT REQUIRE THAT EXHIBITS BE DEFINED WITH ANY SPECIFICITY

#### Rule 2.121(e) provides:

"However, no later than fifteen days prior to the opening of each testimony period, or on such alternate schedule as may be provided by order of the Board, the party scheduled to present evidence must disclose the name and, if not previously provided, the telephone number and address of each witness from whom it intends to take testimony, or may take testimony if the need arises, general identifying information about the witness, such as relationship to any party, including job title if employed by a party, or, if neither a party nor related to a party, occupation and job title, a general summary or list of subjects on which the witness is expected to testify, and a general summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness." (emphasis added)

When Opposer's counsel cites this Rule on page 3 of its Brief, he states or implies that Exhibits must be specifically listed by underlining the word "must". But the must in Rule 2.121(e) applies to the identification of the witnesses, not the evidence or exhibits.

All of the Exhibits 16, 20 and 21 introduced by Applicant at trial relate to the Firestone pipe boot which is depicted in Exhibit 4(Appl.App.p.1) to which the Opposer has not objected.

Applicant was the manufacturer of the Firestone Exhibit 4 pipe boot, and Exhibits 16, 20 and 21 simply are introduced to prove that point.

Applicant's Pre-trial Disclosures state with respect to both Mr. Steimle and Mr. Devitt that they will testify about "the origination of the Firestone --- pipe boots". This statement alone is believed to support the introduction of evidence relating to Portals Plus'(Applicant's) manufacture of the Firestone Exhibit 4 pipe boot.

How can Opposer be prejudiced by the introduction of Exhibits 16, 20 and 21?

Not only does Applicant's Pre-trial Disclosures (Appl.App.p.37-41) tell the Opposer that the witnesses would testify as to the "origination of the Firestone" pipe boot, but during the depositions of AS Holdings employees David V. Smith, Jr., Christopher C. Kintzele, Joseph V. Merryman, David V. Smith, III, and Michael J. Hubbard on November 12 and 13, 2008, the attorney for Applicant, Dillis V. Allen, repeatedly asked these witnesses, in the presence of

Opposer's counsel, Terence Linn, questions about who manufactured the Exhibit 4 pipe boot. So Opposer is hardly surprised by Exhibits 16, 20 and 21.

#### VII. CONCLUSION

In conclusion, the Board's December 20, 2010 Decision striking Exhibit 16 and parts of Exhibits 20 and 21 should be reconsidered and reversed.

Dillis V. Allen Reg. No. 22,460

Attorney for H&C MILCOR, INC.

DATED: January 17, 2011

# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| AS HOLDINGS, INC.        | )                            |
|--------------------------|------------------------------|
| Opposer,                 |                              |
|                          | ) Opposition No. 91182064    |
| -vs-                     | )                            |
|                          | ) Serial No. 76/461,157      |
| H&C MILCOR, INC. f/k/a   | ) Mark: Miscellaneous Design |
| AQUATICO OF TEXAS, INC., | ) (Pipe Boot Product Design) |
| Applicant.               | j                            |

APPENDIX TO APPLICANT, H&C MILCOR, INC.'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECEMBER 20, 2010 DECISION UNDER 37 CFR 2.127(b) AND REQUEST TO THE BOARD UNDER 37 CFR 2.127(c)

|  | PAGE NO. |
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| Exhibit 16   | 2-3      |
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| Applicant's Pretrial Disclosures                                       | 37-41    |
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| Opposer AS Holdings, Inc.'s Notice of Filing with Motions Attorney                                      | 119-120 |

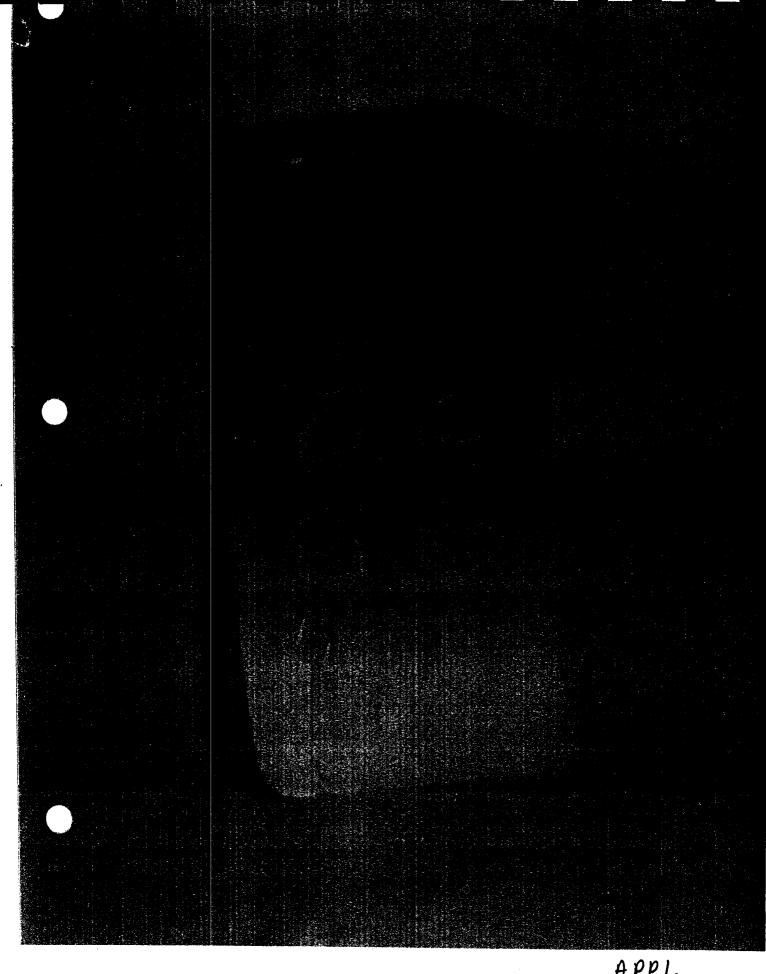
Dillis V. Allen

Attorney for H&C Milcor, Inc. f/k/a Aquatico of Texas, Inc. Reg. No. 22,460

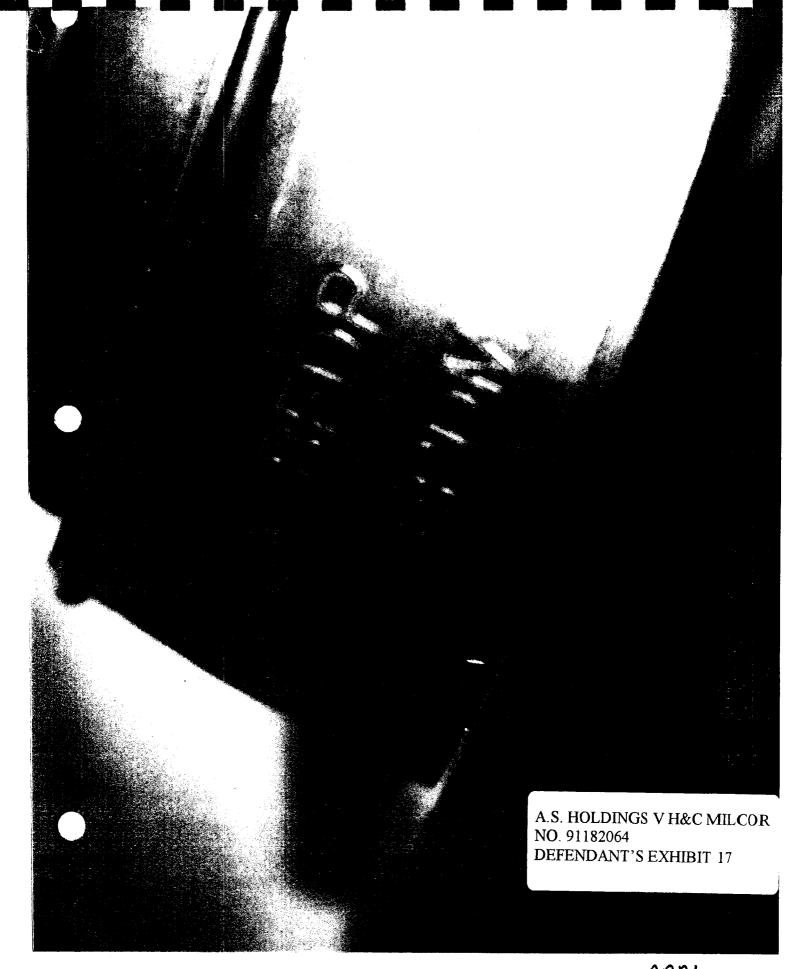
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APPL. APP. 1

A.S. HOLDINGS V H&C MILCOR NO. 91182064 DEFENDANT'S EXHIBIT 16



APPL. APP. 3



APPL. APP. 4



APPL. APP. 5



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### PORTALS PLUS, INC.

639 N. THOMAS DRIVE BENSENVILLE, IL 60106 (630) 766-5240 • FAX (630) 595-7868

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### PORTALS PLUS, INC.

639 N. THOMAS DRIVE BENSENVILLE, IL 60106 (630) 766-5240 • FAX (630) 595-7868

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### PORTALS PLUS, INC.

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PORTALS PLUS 484 N. THOMAS DRIVE BENSENVILLE, IL 60106 (800) 624-8642 \* FAX 8661-866

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P 731 MARRIA AVENUE
ATTN: LANS FLICK
LANCASTER PA 17501

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APPL. APP. 16



PORTALS PLUS

484 N. THOMAS DRIVE BENSENVILLE IL 60 DG (800) 624-8642 & FAX J886

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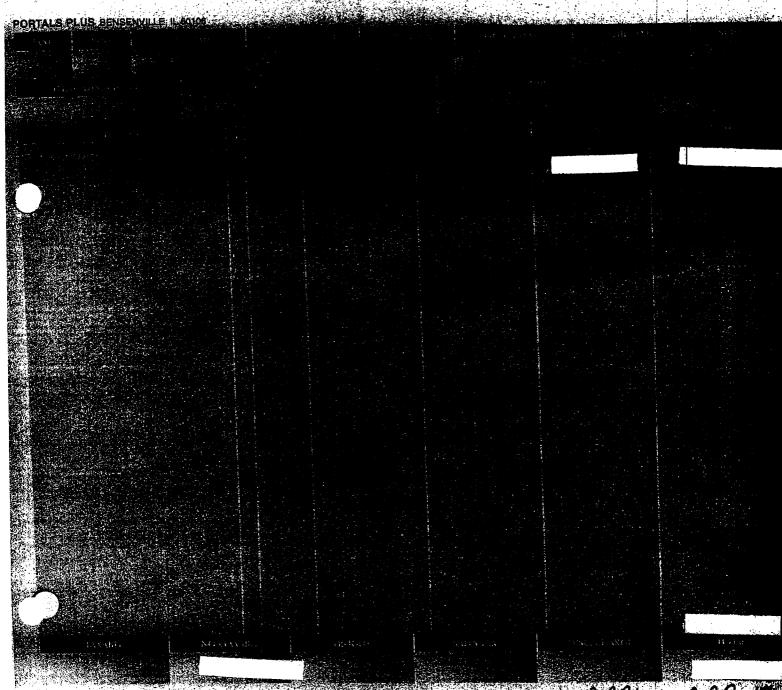
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APPL. APP.

PORTALS PLUS 484 N. THOMAS DRIVE INVOICE BENSENVILLE IL 60106 (800) 624-8642 • FAX (866) 466-9305 REMIT TO: E O'ESCEGODE CHICAGE 11 TO DOBE SIDE SPIRBUI ATTW: ACCTS. PAYABLE OD STONESONS DNIDJING SMOTESTING 1310 E. 95TH STREET BELLOTING PRODUCTS OINDIANAPOLIS IN 16246 W 717-295-2350 PORTALS PLUS BENSENVILLE, IL 60106 TOTAL DU TERMS DESCRIPTION 1784. APP. 18



W56-358-1063)

### PORTALS PLUS, INC.

639 N. THOMAS DRIVE BENSENVILLE, IL 60106 (630) 766-5240 • FAX (630) 595-7868

REMIT TO: P. O. BOX 6500 CHICAGO, IL 60680-6500 INVOICE NO INVOICE DATE PAGE

serreul OATTN: ACCTS, PAYABLE LEIRESTONE RUILDING PRODUCTS CO-310 E. 96TH STREET LINDEANAPOLIS IN 46246

s000001 HFIRESTONE BUILDING PRODUCTS C/O STOCKTON WAREHOUSE 555 ZEPHYR STREET 1209-234-8615 STOCKTON CA 95206

**TOTAL DUE** 

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1.7

Thank Yes for your order.

TAXABLE NONTAYAR E



# PORTALS PLUS, INC. 639 N. THOMAS DRIVE

639 N. THOMAS DRÍVE BENSENVILLE, IL 60106 (630) 766-5240 • FAX (630) 595-7868

REMIT TO: P. O. BOX 6500 CHICAGO, IL 60680-6500 INVOICE NO INVOICE DATE PAGE

ETHEUT SATTN: ACCTS. PAYABLE LETRESTONE BUILDING PRODUCTS CO-2010 E. 96TH STREET TINDIANAPOLIS IN 46240

SOCOOO2
HFIRESTONE BUILDING PRODUCTS
11457 EASTLAND AVENUE
ATTN: RCVG.DEPT. 800-865-5040
TKINGSTREE SC 29556

TOTAL DUE

|   | ****         |           |               |
|---|--------------|-----------|---------------|
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| 42910                                     |              |           |               |
| MEDIUM 1" - 6" SEPH ROOM! ( CHES )        |              |           |               |
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Thank were foll worr order

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| TAXABLE |          | NONTAXABLE       | FREIGHT | SALES TAY | MISC CHARGE | TOTAL |
| .00     |          |                  |         |           |             |       |



### PORTALS PLUS

484 N. THOMAS DRIVE BENSENVILLE, IL 60106 (800) 624-8642 • FAX (866) 466 9

REMIT TO: P.O. BOX 8500 CHICAGO, IL 60880 6500

1000001

PLANSFORM SPILLDING PRODUCTS

ATTE: RCVG.DEPT. 800-865-5040

CEINGSTREE SC 29556

TOTAL DUE

SFIRBUI

ATTN: ACCTS. PAYABLE
PERESTONE BUILDING PRODUCTS CO.
1310 E. 96TH STREET

OINDIANAPOLIS IN 46240

PORTALS PLUS BENSENVILLE IL SOLOS

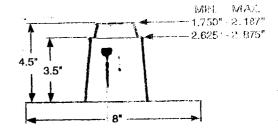
APPL. APP. 21



### A.S.HOLDINGS V H&C MILCOR NO. 91182064 DEFENDANT'S EXHIBIT 19

Small Pipe Bool

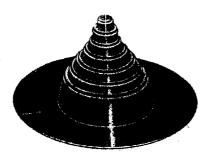


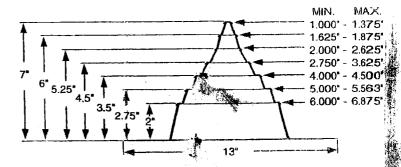


#### **SPECIFICATION**

Furnish and install the Portals Plus Small Pipe Boot as manufactured by Portals Plus, Inc., Bensenville, IL, at all points where any projection penetrates the roof system, and is less than 3" in diameter. The Small Pipe Boot shall include 60 mil EPDM, NEOP RENE, or HYPALON compression molded body. The Small Pipe Boot shall also include Portals Plus' Snaplock Clamp. Use white or black as necessary. Use Portals Plus Adapter Rings for round penetrations less than 1" diameter. Attachment of Small Pipe Boot to roof system, shall be done in accordance with Portals Plus Installation Instructions and the roofing membrane manufacturer's recordiscipents.

### Medium Pipe Boot

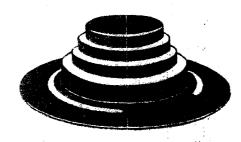


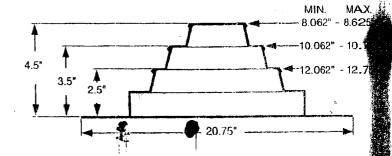


#### **SPECIFICATION**

Entrans and install the Portals Plus Medium Pipe Boot as manufactured by Portals Plus, Inc., Bensenville, IL, at all points where any projection penetrates the roof system, and is less than 6" in diameter. The Medium Pipe Boot shall include 60 mil EPDM, Whenever necessary utilize Portals Plus Adapters to seal to square tubing and angle iron and for round penetrations less than 1" in diameter. Use white or black as necessary. Attachment of Medium Pipe Boot to roof system shall be done in accordance with Portals Plus Installation Instructions and the roofing membrane manufacturer's requirements.

### Large Pipe Boot





#### **SPECIFICATION**

Furnish and install the Portals Plus Large Pipe Boot as manufactured by Portals Plus, Inc., Lensenville, IL, at all points where at projection penetrates the roof system, and is from 8" to 12" in diameter. The Large Pipe Boot shall include 60 mil EPDM MEOPRENE compression molded body. The Large Pipe Boot shall also include Portals Plus' Snaplock Clamp. Use white or blace necessary. Attachment of Large Pipe Boot to roof system shall be done in accordance with Portals Plus Installation Instruction and the roofing membrane manufacturer's requirements.

PORTALS PLUS, INC. 639 Thomas Divio. Bensenville, IL 60106

TEL: (630) 766-5240 FAX: (630) 595-7868

# **FAX TRANSMISSION**

PORTALS PLUS, INC. 639 THOMAS DRIVE BENSENVILLE, IL 60106

PHONE: 630-766-5240 Fax: 630-595-7868

To:

Kevin Mannix

**Firestone** 

ax #:

317-575-7100

Date:

Pages:

2, including this cover sheet.

rom:

Ron Resech

Subject EPDM Pipe Boot

#### **COMMENTS:**

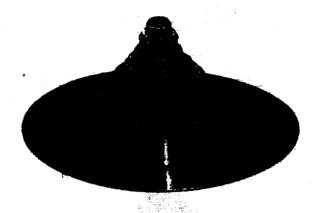
Levin, attached please find the information which you requested. If you have any uestions please feel free to call. Thank you for the opportunity.

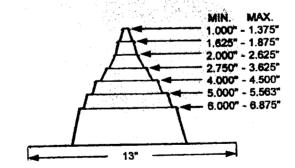
> A.S.HOLDINGS V H&C MILCOR NO. 91182064 DEFENDANT'S EXHIBIT 20



# **Firestone**

Building Products Company EPDM Pipe Boot





AVAILABLE IN BLACK AND WHITE WITH OR WITHOUT QUICKSEAM TAPE

Portals Plus, Inc. 639 N. Thomas Drive, Bensenville, IL 60:06 FAX: 630-595-7868 TEL: 630-766-5240



www.portalsplus.com

May 7, 2003

The Fred Hiveira Photopole Beilding Emducts 200 Caugiossional Blad. 6 around, IN 600332

Then Paul:

Enclosed please find the samples per your request. After you have had an opportunity to review them please give me a call at 1-800-PPI-5240.

Sincerely,

Ronald W. Resech Portals Plus, Inc.



Page 1 of 7

# EcoWhite™ EPDM QuickSeam™ Pipe Flashings

| Product Nun  | nper(s):   | VV56358106A         | :               |          |       |                    |    |
|--------------|------------|---------------------|-----------------|----------|-------|--------------------|----|
|              | •          |                     |                 |          |       |                    |    |
| Prepared By: | Joe Kalwa  | на -                | w#1.c           |          | Date: | <b>9/4/2</b> 007   |    |
|              | Joe Kalwa  | ara, Engineer       |                 |          | -     |                    | 7, |
| Reviewed By: | Jim Janna  | s:ch                | 4               |          | Date: | 9 <b>/27</b> /-007 | •  |
|              | Jim Jann   | asch, EPDM Produ    | ct Manager      |          | -     |                    |    |
| Reviewed By: | John Field | itrouse             |                 |          | Date: | 10/5/3007          |    |
|              | John Flei  | d house, PhD, Direc | tor of Adhesive | <b>3</b> | -     |                    |    |
| Reviewed By: | Stephanie  | : Riner             |                 |          | Date: | <b>10/1</b> / 1007 |    |
|              | Stephani   | e Riner, Purchasing | 3               | ·        | -     |                    |    |
| Reviewed By: | Earry Dev  | itt, Portals Plus   |                 |          | Date: | 1171 - 2007        |    |
|              | Vendor     |                     |                 |          | ~     |                    |    |

A.S.HOLDINGS V H&C MILCOR NO. 91182064 DEFENDANT'S EXHIBIT 21

Product Specification for EcoFlexWhite QuickSeam Pipe Flashing\_S733- PEC-XXX\_12/7/2007
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### 1. Scope

This specification is for the Firestone EcoWhite™ EPDM QuickSeam™ Pipe Finishing, hereafter referred to as EcoWhite QuickSeam Pipe Flashing, is to be used in conjunction with Firestone EcoWhite Roofing Systems. The Firestone EcoWhite QuickSeam Pipe Flashing is a pre-fabricated pipe Flashing with a tape adhesive laminated to the bottom flange of the Flashing. They are to be used to flash pipes, rods or other similar penetrations on roofs. This specification covers a EcoWhite QuickSeam Pipe Flashing that can be used to flash a variety of pipe sizes from 1" O.D. to 6.875" O.D.

### 2. Applicable Documents

- 2.1 The EcoWhite QuickSeam Pipe Flashing shall pass the Dead Load Shear Test when testert in accordance with Firestone Test Specification W56-358-1002
- 2.2 Appendix 1: EPDM Material Specifications (attached)
- 2.3 Firestone Building Products "Quality System Manual" issued 7 Sept 2004
- 2.4 Label Specification for Firestone Accessories \$733-TEC-204
- 2.5 Package Specification for QuickSeam Products S733-TEC-211

### 3. Physical and Performance Requirements

- 3.1 QuickSeam Tape Material The tape adhesive shall be SP-610 from ADGO, white in color, or an alternate approved by Firestone.
- 3.2 Dimensions:
  - 3.2.1 The EcoWhite QuickSeam Pipe Flashing shall conform dimensions by to Figure 1 of this specification.
  - 3.2.2 The QuickSeam tape thickness shall be .030"-.040".
  - 3.2.3 The QuickSeam tape shall extend 1/16" to 1/8" beyond the flange of the EcoWhite QuickSeam Pipe Flashing.

### 4. Qualification Testing

Firestone shall conduct a series of qualification tests on each vendor's product. Successful passing of these tests shall qualify a vendor's product for use by Firestone. In addition, Firestone shall conduct such qualification tests in-house, as required, to assure that a vendor's product continues to periods satisfactorily.

|  | Specification Value           |
|--|-------------------------------|
| Tensile strength performed at room temperature | 1000 psi (minimum)            |
| Elongation performed at room temperature       | 300% (minimum)                |
| Die C tear performed at room temperature       | 100 lbf/ln (minimum)          |
| Shore A Duro neter Hardness                    | 55-70 (reading at 3 sec inds) |
| Tensile strength after heat aging*             | 750 psi (minimum)             |

Product Specification for EcoFlexWhite QuickSeam Pipe Flashing\_S733-TEC-XXX\_12/772/007
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Page 3 of ?

| (minimum)<br>A, maximum  |
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| nimum)   |
|  |

<sup>\*</sup>Heat aging: 128 days at 240°F

### 5. Inspection/Certification

- 5.1 Vendor shall inspect finished EcoWhite QuickSeam Pipe Flashing at a frequency that will ensure Firestone receives only kits that meet this specification. A written certification that kits shipped to Firestone meet this specification shall be required with each shipment. Certification forms shall be sent to the attention of the Purchasing Agent.
- 5.2 Firestone may inspect samples of incoming material to ensure that the product meets the requirements of this specification.

### 6. Packaging and Marking

- 6.1 Packaged 10 boots per carton. Refer to Firestone Package Specification for QuickSeam Taper Products (S733-TEC-211). Package contents include clamps and Application Instructions.
- 6.2 Refer to Firestone Label Specification for Accessories (S733-TEC-204).

Template: #1005 (8 1/2" x 5 1/2"); Elements: A, B, C, D, E, F, G, J; Template: #1007

6.3 A date code (month and year) shall be molded on the top surface of the Ec vVhite QuickSeam Pipe Flasting.

### 7. Warranty

Supplier shall warrant the workmanship and the integrity of the EcoWhite Quick Seam Sipe Flashing for a period of 20 years to perform as intended when installed in accordance with Lirestonic epoclific these

# 8. Changes in Process or Product

Vendor shall be required to report to Firestone Purchasing Department 30 days crior to producing and shipping any material when making a change in a purchased raw material, materiacturing process, manufacturing location, sources, or the product. Firestone will review all changes and shall reserve the approve or reject any proposed changes.

Product Specification for EcoFlexWhite QuiokSeam Pipe Flashing\_S733-TEG-XXX\_12/7/2007
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<sup>\*\*</sup>Testing and performance may be certified by an outside laboratory.



Die C tear, room temperature

Supplier:

# **Product Specification**

Material:

Page 4 of 7

# **EcoWhite QuickSeam Pipe Flashing Certification Form**

| Date<br>sembled:          |   |                 | Ву:       |            |
|---------------------------|---|-----------------|-----------|------------|
| o Terracoli               |   |                 | Lot#:     |            |
| Inspection                |   | EcoWhite QuickS | eam Pipe  | Flashin    |
|                           | Primady j   |                 |           | tzyn Value |
| Base Poly                 | mer ;   |                 | 100%      | EPDM       |
| Color                     |   |                 | W         | 'hite      |
| Shore A H<br>seconds)     | ardress (reading at 3                                     |                 | 55        | 5-70       |
| Dimensio                  | ns (:See Figure 1)  |                 |           |            |
| Thickness                 | of flange and wall  |                 | 0.055"    | - 0.075"   |
| Flange Of                 | )   |                 | . 1       | 13"        |
| Legibility of printing or | of date code and all parts                                |                 | Note 1 in | n Figure 1 |
| cured in fla              | traps, splits, pitting,<br>ash, or surface<br>or blisters |                 | 1         |            |
| Tensile str               | reng h, room<br>ire                                       |                 | 1000 psi  | minimum,   |
| Elongation                | n, room temperature                                       |                 | 300%,     | minimum    |

Product Specification for EcoFlexWhite QuickSeam Pipe Flashing\_S733-TEC-XXX\_12/7/2007
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100 lbf/in, minimum



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|                                     | <b>Specification</b> Value |
|-------------------------------------|----------------------------|
| Tensile strength, after heat aging* | 750 p∉i, minimum           |
| Elongation, after heat aging*       | 225%, minimum              |
| Die C tear, after I eat aging*      | 75 lbrin, minimum          |
| Durometer, after heat aging*        | 80 Sho⊕ A, maximum         |
| QuickSeam Deac Load Shear<br>Test   | less thar 0.125" slippage  |
| QuickSeam tape thickness            | .C :C"040"                 |
| QuickSeam tape beyond flange        | 1/ 3' to 1/8"              |

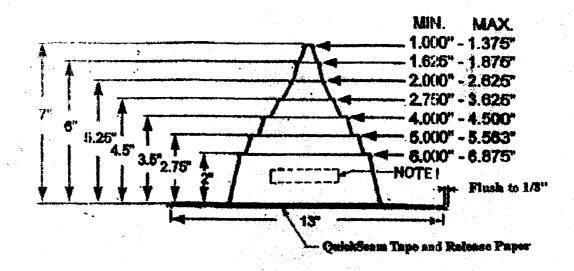
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Product Specification for EcoFlexWhite QuickSeam Pipe Flashing\_S730 TEC-XXX\_12/7/2007
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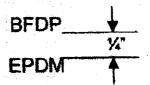
Page 6 of 7

### FIGURE 1: EcoWhite QuickSeam Pipe Flashing Dimensions



#### NOTES:

- "BFDP" and "EPDM" to be molded and spaced as shown by Detail "A".
- 2. Tolerance on dimensions shown is ±0.06" unless otherwise noted.



Detail "A"

Product Specification for EcoFlexWhite QuickSeam Pipe Flashing\_S733-TEC-XXX\_12/7/2007
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# Appendix 1: EPDM Material Specifications B-1000

| Property   |                    | Fullimence                           |
|--|--------------------|--------------------------------------|
| Specific Gravity   | ASTM D-297         | 1.13 ± .03                           |
| Literapiana  | ASTM D-412 (Die C) | 300% minimum<br>(9.6 MPa)            |
| Tensile Strength   | ASTM D-412 (Die C) | 1000 psi (9.6 MPa)<br>minimum        |
| i ear Resistance   | ASTM D-624 (Die C) | :00 lbf/in minimum<br>(33.3 N/mm)    |
| Shore A Durometer  | ASTM D-2240        | 55 - <b>70</b>                       |
| Ozone Resistance:  | ASTM D-1149        | No Cracks                            |
| 7 days @ 100pphm <b>@ 100°F with 50%</b><br>extension  | 13 <u>13</u> 24 3  |                                      |
| Heat Aging   | ASTM D-573         |                                      |
| 28 days @ 240°F  |                    |                                      |
| Tensile Strength, after Heat Aging   | ASTM D-412         | 750 <b>ps</b> i minimum<br>(8.9 MPa) |
| Elongation, after Heat Aging   | ASTM D-412 (Die C) | 225% minimum                         |
| Tear Resistar ce, after Heat Aging   | ASTM D-624 (Die C) | 75 lbf/in minimum<br>(26.3 N/mm)     |
| Shore A Durometer, after Heat Aging  | ASTM D-2240        | 80 maximum                           |
| Brittleness Temperature  | ASTM D-2137        | -49°F (-45°C)                        |
| Resistance to Water change in weight after immersion 7 (lays @ 158°F, maximum, %   | ASTM D-471         | +8, -2                               |
| Water Vapor Permeability max., perm mils   | ASTM E-96          | 2.0                                  |
| Tolerance on Nominal Thickness, %  | ASTM D-751         | ± 10                                 |
| Penetration pocket Composition: Weight percent of Polymer that is EPDM, % Weight percent of material that is EPDM Polymer, % | ASTM D-297         | 100<br>30 minimum                    |

<sup>\*</sup>Heat aging is: 28 days at 240°F per ASTM D-573

Produc: Specification for EcoFlexWhite QuickSeam Pipe Flashing\_S733-TEC-XXX\_12/7/2007
THIS REVISION SUPERSEDES ALL PREVIOUS ISSUES

Deville, Larry

From:

Kalwara, Joe [KalwaraJoe@firestonebp.com]

Sent

Friday, December 07, 2007 11:09 AM

To:

Devitt, Larry

 $C_{i}$ 

Weaver, Vicki J

Stripped: RE: White pipe boot

and the specific reflect your values. We will forward shortly for your review.

From: Devitt, Larry [mailto:Larry:Devitt@hartcool.com]

Sent: Friday, December 07, 2007 11:11 AM

To: Kalwara, Joe

Subject: FW: White pipe boot

Importance: High

Joe, are you OK with our published test results on the White EPDM boots NOT complying with the Purchase Spechat Lecceived?

Based on Scott's note on delivery needs, we need to resolve that quickly.

Thanks

Larry Dovint

From: Hettmansperger, Scott [mailto:HettmanspergerScott@firestonebp.com]

Sent: Friday, December 07, 2007 10:02 AM

To: Devitt, Larry Cc: Victor, Max I.

POTRE D

Subject: RE: White pipe boot

All beautiful and this part to VMI you should see these orders show up very soon. We will be running this part to VMI you should see these orders show up very soon. We will be running this part to VMI you should see these orders show up very soon. We will be running this part to VMI you should see these orders show up very soon. We will be running this part to VMI you should see these orders show up very soon. We will be running this part to VMI you should see these orders show up very soon. We will be running this part to VMI you should see these orders show up very soon.

Scott Hettmansperger

Purchasing Manager- TPO Raw Viaterials and Accessories

Confine Products, 114

力CEL 96th Street

Indianapolic, IN 46240

FH被345.575.7050

Fax® 317-816-9838

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From: Devitt, Larry [mailto:Larry.Devitt@hartcool.com]

Sent: Friday, November 02, 2007 9:30 AM

To: Hetimansperger, Scott Guisfeck: RE: White pipe boot

Good merning, Scott,

Yes, with at least!

eces

your cost would drop to only

ich.

From: Hettmansperger, Scott [mailto:HettmanspergerScott@firestonebp.com]

Sent: Friday, November 02, 2007 7:35 AM

To: Devitt, Larry

Subject: RE: White pipe boot

- Particological

tons with logo will there be a price break and if so what is it?

Cool Hettmansperger

Purchasing Manager-TPO Raw Materials and Accessories

19 8 perceded Products, LLC

310 E. 96th Street Indianapolis, IN 46240 PH# 317-575-7050

Fax# 317-816-3838

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From: Devitt, Larry [mailto:Larry.Devitt@hartcool.com]

Sent: Thursday, November 01, 2007 5:14 PM

Zo: Hetimansperger, Scott

Cc: Kalwara, Joe

Subject: RE: White pipe boot

APPL. APP. 34

:0177000

-Attached is your cost for the Taped White EPDM Pipe Boots. Please note that we have two "concerns".

- 1. The purchase spec differs from our published test results for white EPDM (copy attached). If Joe has tested one of the samples that I sent and it conforms to the purchase spec requirements, then the "concern" is idealness to
- 2. Finded on the small quantities of White Boots currently anticipated, the costs are based on "NO LOGO" boots (Firestone label and packaging, of course). If the white EPDM system sees increased volume, we will be able to mold with the BFDP/EPDM logo as requested. Logoed boots would require orders of at least toots.

Please call if you have any questions. Thank you for the opportunity.

invers Hedrenoperger, Scott [mailto:HettmanspergerScott@firestonebp.com]

Sent: Tuesday, October 30, 2007 7:53 AM

To: Devitt, Larry Cc: Kalwara, Joe

Subject: White pipe boot

Larry.

Specification for white pipe boot is attached. Please review. Also, will need a quote based on a volume of approx artons.

Legarda.

Scott Hettmansperger

Purchasing Manager-TPO Raw Materials and Accessories

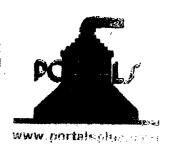
And the survey of the Armitecture of the

810 E. 96th Street Indianapolis, IN 46240 PH# 317-575-7050 Faxe 517-616-3838

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10.9 JATOT

Portale Plue, Inc. 639 N. Thomas Drive, Bensenville, IL 6010 TEL: 630-766-5240 FAX: 630-595-786



May 1, 2003

Mr. Paul Oliveira Firestone Building Products 525 Congressional Hlvd. Carmel, IN 46032

Dear Paul:

As per your request enclosed please find a distributor binder. If you have any questions please do not hesitate to call.

Sincerely,

Ronald W. Resech Portals Plus, Inc.

Pros SEND MIZ SAMPLES OF 
Small prope BOUT - EPDM

ARROW PIDE BOUT - EPDM

OUTSIDE CURNOT - EPDM

INSIDE CORNEL - EPDM

APPL. APP. 36

Prefabricated Roof Accessories For ALL Roofing Systems!

10/10.9

FIRESTURE BLDG. PRODUCTS

AS HOLDINGS Vs. H&C MILCOI Opposition No. 91 182064 Serial No. 76/461,157 Deft. No. 9 10 A.S. HOLDINGS V H&C MILCOR NO. 91182064 **DEFENDANT'S EXHIBIT 22** 

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| AS HOLDINGS, INC.,                                 | )   |
|--|---|
| Opposer,   | ;   |
| -vs-   | ) Opposition No. 91182064   |
| H&C MILCOR, INC. f/k/a<br>AQUATICO OF TEXAS, INC., | ) Serial No. 76/461,157<br>) Mark: Miscellaneous Design<br>) (Pipe Boot Product Design) |
| Applicant.   |   |

APPLICANT, H&C MILCOR, INC. f/k/a AQUATICO OF TEXAS, INC.'S PRETRIAL DISCLOSURES

Pursuant to Rule 2.121(c), 37 C.F.R. Section 2.121(d), Applicant, H&C Milcor, Inc. f/k/a Aquatico of Texas, Inc., makes the following pretrial disclosures:

#### WITNESSES

Applicant intends to take testimony or may take the testimony if the need arises, from the following witnesses:

1. Tom Mollen, Field Supervisor/Installer of Winward Roofing, 919 S. Sacramento, Chicago, IL 60611, Telephone: 773/638-6580. Mr. Mollen may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

- 2. John Cirachi, Controller of Winward Roofing,, 919 S. Sacramento, Chicago, IL 60611, Telephone: 773/638-6580. Mr. Cirachi may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.
- 3. Larry Kozak, Engineering Manager of Hart & Cooley, 815 Kimberly Drive, Carol Stream, IL 60188, Telephone: 630/588-2544. Mr. Kozak may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.
- 4. Larry Devitt, Marketing Manager/Architect of Hart & Cooley, 815 Kimberly Drive, Carol Stream, IL 60188, Telephone: 630/588-2514. Mr. Devitt may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.
- 5. Sean Steimle, Vice President of Hart & Cooley, 815 Kimberly Drive, Carol Stream, IL 60188, Telephone: 630/588-2510. Mr. Steimle may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the

functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

- 6. Russ Verbrugge, Engineer of Hart & Cooley, 5030 Corporate Exchange Boulevard SE, Grand Rapids, MI 49512, Telephone: 616/656-8200. Mr. Verbrugge may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.
- 7. Tom Kelly, Owner/Roofing Manager of 2001 Company, 325 Thomaston Avenue, Waterbury, CT 06702, Telephone: 800/537-7663. Mr. Kelly may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.
- 8. George Criel, President of Century Roofing Consulting, 1645 Hicks Road, Rolling Meadows, IL 60008, Telephone: 847/202-8500. Mr. Criel may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials

and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

- 9. Mitch Rabin, Owner of A1 Roofing, 1425 Chase Avenue, Elk Grove Village, IL 60007, Telephone: 847/952-3600. Mr. Rabin may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.
- 10. David Rabin, Owner of A1 Roofing, 1425 Chase Avenue, Elk Grove Village, IL 60007, Telephone: 847/952-3600. Mr. Rabin may testify regarding Applicant's products, Opposer's activities regarding pipe boots, the functional aspects of the industry and Portals Plus Pipe Boots, the origination of the Firestone and other manufacturers' pipe boots, the installation of pipe boots, the marketing of industry and Portals Plus pipe boots, materials and specifications thereof used in the manufacture of pipe boots, the testing of pipe boots, the recognition of the Portals Plus pipe boot in the trade and industry, the file history of Serial No. 76/461,157, patents relating to pipe boots, and industry practices.

#### EXHIBITS

Applicant intends to rely on or may rely on the Exhibits listed in the Opposer, AS HOLDINGS, INC.'s Pretrial Disclosures, and additionally may rely on the deposition witnesses and exhibits also listed in Opposer, AS HOLDINGS, INC.'S Pretrial Disclosures, and also may rely on further

Exhibits that may be produced at trial. These latter Exhibits will be provided to Opposer's attorney either in advance of the testimony of the individual witnesses or may be contemporaneously provided as the testimony of the individual witnesses progresses.

Allen

Attorney for H&C Milcor, Inc. f/k/a Aquatico of Texas, Inc.

Reg. No. 22,460

Dated: October 16, 2009

#### CERTIFICATE OF SERVICE

This is to certify that a copy of APPLICANT, H&C MIL-COR, INC. f/k/a AQUATICO OF TEXAS, INC.'S PRETRIAL DIS-CLOSURES was sent via Federal Express to the Trademark Trial and Appeal Board on October 16, 2009, and a true and correct copy of same was sent on October 16, 2009, via first-class mail, postage prepaid, to Opposer's counsel as follows:

Terence J. Linn, Esq. Van Dyke, Gardner, Linn & Burkhart, LLP 2851 Charlevoix Drive SE, Suite 207 Grand Rapids, MI 49588-8695

Dillis V. Allen

Dillis V. Allen, Esq. 105 S. Roselle Road Suite 101 Schaumburg, IL 60193 847/895-9100

# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| ALPHA SYSTEMS, INC.                                | D.V. A.L.   |
|--|---|
| Onnosar  | Opposition No. 91182064                               |
| Opposer,<br>v.                                     | ) Serial Number 76/461,157 ) Mark: <b>DESIGN ONLY</b> |
| H&C MILCOR, INC., f/k/a<br>AQUATICO OF TEXAS, INC. | )   |
| Applicant.   |   |
|  |   |

# OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS (Nos. 1-37)

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Opposer, Alpha Systems, Inc. ("Alpha Systems" or "Opposer"), through its undersigned attorneys, hereby requests that Applicant, H&C Milcor, Inc. ("H&C Milcor" or "Applicant") produce for inspection and copying at the offices of Van Dyke, Gardner, Linn & Burkhart, LLP, 2851 Charlevoix Drive, S.E., Suite 207, Grand Rapids, Michigan 49546, documents and things described in the numbered paragraphs below.

#### **DEFINITIONS**

In the requests appearing below, the following definitions shall apply:

A. The term "Applicant" shall mean H&C Milcor, Inc., any and all predecessor's in interest and/or any and all successor's in interest of application Serial No. 76/461,157, including but not limited to Portals Plus, Inc. and Hart & Cooley, Inc., and shall include each of its officers, directors, trustees, employees, staff members, partners, associates, agents, counsel, and other representatives; and each business entity with which H&C Milcor, Inc. is associated and

shall include each of its divisions, subsidiaries, parent companies, joint ventures, related companies, officers, directors, trustees, employees, staff members, agents, counsel, and other representatives, jointly and severally.

- B. The term "H&C Milcor" shall mean H&C Milcor, Inc. and/or Hart & Cooley, Inc., and shall include each of its officers, directors, trustees, employees, staff members, partners, associates, agents, counsel, and other representatives; and each business entity with which H&C Milcor, Inc. is associated and shall include each of its divisions, subsidiaries, parent companies, joint ventures, related companies, officers, directors, trustees, employees, staff members, agents, counsel, and other representatives, jointly and severally.
- C. The term "Applicant's Application" shall mean United States Trademark Application Serial No. 76/461,157.
  - D. The term "Opposer" or "Alpha Systems" shall mean Alpha Systems, Inc.
- E. The term "Applicant's Mark" shall mean the mark shown in the trademark application of Applicant, Serial No. 76/461,157.
- F. The term "person", in singular or plural form, shall be broadly construed to include natural persons, associations, joint ventures, partnership, companies, corporations, and any other organization or entity.
- G. The term "documents and things", in singular or plural form, shall be broadly construed to include any tangible item either containing or exhibiting any information and/or communication and to include any tangible item which may either convey or exhibit the same through any medium whatsoever.
- H. The term "communications", in singular or plural form, shall mean any oral, written, recorded, or unrecorded expression of any information whatsoever.

- I. The term "identify", when used with respect to a document, means to:
- 1. state the nature and substance of the document with sufficient particularity to enable it to be differentiated and distinguished from all other documents;
- 2. state the title, number, if any, and the official designation, if any, of the document;
- 3. identify the author and the originator of the document or in whose name the document was issued if different from the author;
  - 4. state the date of the document;
  - 5. identify the address of the document;
- 6. identify each person whose signature is affixed to the document or who is otherwise named and/or referenced in the document;
- 7. state the date the document was executed, if different from any other date the document may bear;
  - 8. describe the subject matter of the document;
- 9. identify each person who has custody or control of the document and of each duplicate of the document; and
- 10. state whether the document will be voluntarily made available for inspection and copying.
- J. The term "identify" when used with respect to a person means to state:
  - 1. the person's complete legal name;
- 2. each of the current business and residence addresses and telephone numbers of such person, or, if such information is unknown and cannot be ascertained after exercising reasonable diligence, each of the last-known business and residence

addresses and telephone numbers of such person; and

- 3. the current employer of such person and the employer's address and telephone number, or, if such employer is not known and cannot be ascertained after exercising reasonable diligence, the last-known employer of such person and that employer's address and telephone number.
- K. The term "describe" when used with respect to an act, occurrence, statement, communication, conduct, or omission, or any document and thing or other event or the like (hereinafter collectively referred to as "act") means to:
  - 1. describe the substance of the event or events constituting the act;
  - 2. state the date or dates of the event or events constituting the act;
  - 3. identify each person participating in the act;
  - 4. identify each person who witnessed or may have witnessed the act;
  - 5. describe the substance of each person's participation in the event or events constituting the act;
  - 6. describe the mode by which the act occurred (e.g., by telephone, by letter, etc.); and
  - 7. identify each document which relates to, refers to, evidences, or embodies the act.

#### **INSTRUCTIONS**

In the event Applicant claims privilege with respect to any information, document, and/or thing (hereinafter "information") requested, Applicant shall supply at the time of production a listing of all such nonproduced information, such listing to include the following:

a. the number of the request calling for the production of such information;

- b. the date of any such information;
- c. the identity of each person who signed, prepared, provided, or assigned in the preparation of any such information;
- d. the identity of each person and concern to whom such information was addressed;
- e. the name of each person and concern, other than the addressee shown thereon, to whom any such information, including copies and reproductions thereof, was given or sent;
- f. a brief description of the subject matter of such information; and
- g. the ground (i.e., attorney-client privilege, etc.) for refusing to produce such information.

#### REQUESTS FOR PRODUCTION

- 1. All documents and things referring or relating to the above-identified mark shown in Application Serial No. 76/461,157, filed October 18, 2002 (hereinafter referred to as "Applicant's Mark").
- 2. A copy of a corporate organization chart of Applicant as of October 18, 2002 and a copy of a corporate organization chart of Applicant as of December 25, 2007. In the event that corporate organization charts are not available, documents and things sufficient to establish the corporate organizational structure of Applicant.
- 3. All documents and things referring or relating to development of Applicant's Mark.
- 4. All documents and things referring or relating to adoption of Applicant's Mark.
- 5. All documents and things referring or relating to any trademark search or investigation undertaken by or on behalf of Applicant regarding Applicant's Mark, including, but not limited to, the materials generated in said search or investigation.

- 6. All documents and things referring or relating to opinion of counsel regarding Applicant's Mark, including, but not limited to, opinion of counsel regarding Applicant's ability to use and/or register Applicant's Mark.
- 7. All documents and things referring or relating to first use of Applicant's Mark.
- 8. All documents and things referring or relating to first use in interstate commerce of Applicant's Mark.
- 9. All documents and things referring or relating to any search or investigation undertaken by or on behalf of Applicant regarding pipe boots.
- 10. All documents and things referring or relating to all opinion of counsel obtained by or on behalf of Applicant relating to Opposer.
- 11. Three exemplars of each label or package distributed by Applicant bearing Applicant's Mark.
- 12. Documents and things sufficient to establish the manner in which Applicant uses or intends to use Applicant's Mark on Applicant's goods and services.
- 13. Three exemplars of all advertising and promotional materials distributed or intended to be distributed by Applicant in association with Applicant's Mark.
- 14. Documents and things sufficient to establish the manner in which Applicant uses or intends to use Applicant's Mark in association with advertising of Applicant's goods and services.
- 15. Documents and things sufficient to establish annual sales by Applicant of goods and services in association with Applicant's Mark.
- 16. All summary documents, whether annual, quarterly, or other time period, relating or referring to sales of Applicant's goods or services in association with Applicant's Mark.

- 17. Documents and things sufficient to establish annual advertising and promotion expenditures by Applicant, or intended to be expended by Applicant, associated with Applicant's Mark.
- 18. All summary documents, whether annual, quarterly, or for other time period, relating or referring to advertising or promotional expenditures by Applicant regarding Applicant's Mark.
- 19. Documents and things sufficient to establish the channels of trade in which Applicant distributes or intends to distribute goods and services in association with Applicant's Mark.
- 20. Documents and things sufficient to establish the class or type of customers to which Applicant distributes or intends to distribute goods and services in association with Applicant's Mark.
- 21. All documents and things referring or relating to third-party use of the Applicant's Mark.
- 22. All documents and things referring or relating to instances of actual confusion regarding Applicant, Applicant's Mark, and/or goods or services of Applicant distributed in association with Applicant's Mark.
- 23. All documents and things referring or relating to Applicant's first use of Applicant's Mark.
- 24. All documents and things referring or relating to Applicant's first use in interstate commerce of Applicant's mark.
- 25. All documents and things referring or relating to Applicant's use of Applicant's mark in April 1982.
- 26. All documents and things referring to market studies conducted by or on behalf of Applicant regarding Applicant's Mark, or goods and services intended to be distributed by Applicant in association with Applicant's Mark.

- 27. All documents and things referring or relating to surveys conducted by or on behalf of Applicant concerning Applicant's Mark, or goods and services intended to be distributed by Applicant in association with Applicant's Mark.
- 28. All documents and things referring or relating to agreements negotiated and/or entered into by Applicant relating to Applicant's Mark, including, but not limited to, assignments, licenses, permissions, or consents.
- 29. All documents and things referring or relating to transfer of ownership of Applicant's Mark from Portals Plus to H&C Milcor.
- 30. All documents and things referring or relating to transfer of the application for Applicant's Mark from Portals Plus to H&C Milcor.
- 31. All documents and things referring or relating to any litigation or administrative proceeding relating to Applicant's Mark.
- 32. All documents and things referring or relating to communication with any expert or potential expert contacted by or on behalf of Applicant regarding this opposition proceeding, including, but not limited to, *curriculum vitae* and reports by said expert.
- 33. All documents and things referring or relating to the specimens submitted by Applicant in Applicant's application.
- 34. All documents and things referring or relating to the Applicant's Mark.
- 35. All documents and things referring or relating to the change of H&C Milcor, Inc. to Hart & Cooley, Inc.
- 36. All documents and things referring or relating to transfer of the application for Applicant's Mark from H&C Milcor, Inc. to Hart & Cooley, Inc.

37. All documents and things relating to an affidavit under 37 C.F.R. 2.41(b), dated October 16, 2002, filed in Applicant's Application relating to prosecution of Applicant's Mark, the documents and things including, but not limited to, Exhibits A through T.

Respectfully submitted,

ALPHA SYSTEMS, INC.

By: Van Dyke, Gardner, Linn & Burkhart, LLP

Dated: May 5, 2008

Terence J. Linn

Matthew D. Kendall

2851 Charlevoix Drive S.E., Suite 207

P.O. Box 888695

Grand Rapids, MI 49588-8695

(616) 975-5500

# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| ALPHA SYSTEMS, INC.,     | )  |
|--------------------------|--|
| Plaintiff,               | )  |
|                          | ) Opposition No. 91182064  |
| -vs-                     | )  |
| H&C MILCOR, INC. f/k/a   | <ul><li>) Serial No. 76/461,157</li><li>) Mark: Miscellaneous Design</li></ul> |
| AQUATICO OF TEXAS, INC., | ) (Pipe Boot Product Design)   |
| Defendant.               | )  |

H&C MILCOR, INC.'S RESPONSES TO OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

Defendant, H&C MILCOR, INC. f/k/a AQUATICO OF TEXAS, INC., by its attorney, Dillis V. Allen, pursuant to Rule 34 of the Federal Rules of Civil Procedure, hereby responds to Plaintiff, ALPHA SYSTEMS, INC.'S, FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS, as follows:

#### GENERAL OBJECTIONS

- 1. H&C MILCOR objects to each of Plaintiff's Requests to the extent that it seeks information or documents subject to the attorney-client privilege, information or documents subject to work product doctrine, and/or documents prepared for use by H&C MILCOR'S attorneys in anticipation of litigation.
- 2. H&C MILCOR objects to each of Plaintiff's Requests to the extent that a definition, instruction, or request, as stated in the Definitions and Instructions section of Plaintiff's Requests, seeks to impose an obligation on H&C MILCOR to provide information or produce documents beyond the scope of discovery provided under the Federal Rules of Civil Procedure or to perform tasks not required by such Rules, including any requests for supplementation.
- 3. H&C MILCOR objects to each of Plaintiff's Requests to the extent that it seeks documents that do not pertain to the subject matter of this action or which are not reasonably calculated to lead to discovery of admissible evidence.

- 4. H&C MILCOR objects to each of Plaintiff's Requests to the extent it includes the definition of "Documents" as set forth in the Definitions and Instructions Section of Plaintiff's Requests. The definition of "Documents" is unclear as to what documents are to be included. Notwithstanding this objection, H&C MILCOR will produce originals and copies of all documents, as the term "Documents" is defined and interpreted under the Federal Rules of Civil Procedure, as stated in the specific responses hereinafter set forth.
- 5. H&C MILCOR objects to each of Plaintiff's Requests to the extent that Plaintiff seeks to require H&C MILCOR to produce documents in a particular manner. Notwithstanding this objection, H&C MILCOR will produce its documents and things for inspection by Plaintiff's counsel pursuant to the provisions of Rule 34 of the Federal Rules of Civil Procedure.
- 6. H&C MILCOR will furnish Plaintiff's counsel in due course with an identification of any documents which are described by one or more of Plaintiff's Requests and which have been withheld from production because H&C MILCOR claims that they are privileged or immune from discovery in this action.

#### RESPONSES

1. All documents and things referring or relating to the above-identified mark shown in Application Serial No. 76/461,157, filed October 18, 2002(hereinafter referred to as "Applicant's Mark".

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

2. A copy of a corporate organization chart of Applicant as of October 18, 2002 and a copy of a corporate organization chart of Applicant as of December 25, 2007. In the event that corporate organization charts are not available, documents and things sufficient to establish the corporate organizational structure of Applicant.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

3. All documents and things referring or relating to development of Applicant's Mark.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

4. All documents and things referring or relating to adoption of Applicant's Mark.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

5. All documents and things referring or relating to any trademark search or investigation undertaken by or on behalf of Applicant regarding Applicant's Mark, including, but not limited to, the materials generated in said search or investigation.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

6. All documents and things referring or relating to opinion of counsel regarding Applicant's Mark, including, but not limited to, opinion of counsel regarding Applicant's ability to use and/or register Applicant's Mark.

RESPONSE: Privileged. These documents cannot be logged because they were largely oral.

7. All documents and things referring or relating to first use of Applicant's Mark.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

8. All documents and things referring or relating to first use in interstate commerce of Applicant's Mark.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

9. All documents and things referring or relating to any search or investigation undertaken by or on behalf of Applicant regarding pipe boots.

RESPONSE: Defendant cannot locate such documents as yet. An investigation is continuing.

10. All documents and things referring or relating to all opinion of counsel obtained by or on behalf of Applicant relating to Opposer.

RESPONSE: None

11. Three exemplars of each label or package distributed by Applicant bearing Applicant's Mark.

RESPONSE: Not applicable, not a name mark.

12. Documents and things sufficient to establish the manner in which Applicant uses or intends to use Applicant's Mark on Applicant's goods and services.

RESPONSE: Mark is not "on" the goods.

13. Three exemplars of all advertising and promotional materials distributed or intended to be distributed by Applicant in association with Applicant's Mark.

RESPONSE: These will be produced.

14. Documents and things sufficient to establish the manner in which Applicant uses or intends to use Applicant's Mark in association with advertising of Applicant's goods and services.

RESPONSE: These will be produced.

15. Documents and things sufficient to establish annual sales by Applicant of goods and services in association with Applicant's Mark.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. These will be produced.

16. All summary documents, whether annual, quarterly, or other time period, relating or referred to sales of Applicant's goods and services in association with Applicant's Mark.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

17. Documents and things sufficient to establish annual advertising and promotion expenditures by Applicant, or intended to be expended by Applicant, associated with Applicant's Mark.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

18. All summary documents, whether annual, quarterly, or for other time period, relating or referring to advertising or promotional expenditures by Applicant regarding Applicant's Mark.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

19. Documents and things sufficient to establish the channels of trade in which Applicant distributes or intends to distribute goods and services in association with Applicant's Mark.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

20. Documents and things sufficient to establish the class or type of customers to which Applicant distributes or intends to distribute goods and services in association with Applicant's Mark.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

21. All documents and things referring or relating to third-party use of the Applicant's Mark.

RESPONSE: Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

22. All documents and things referring or relating to instances of actual confusion regarding Applicant, Applicant's Mark, and/or goods or services of Applicant distributed in association with Applicant's Mark.

RESPONSE: None

23. All documents and things referring or relating to Applicant's first use of Applicant's Mark.

RESPONSE: These will be produced.

24. All documents and things referring or relating to Applicant's first use in interstate commerce of Applicant's mark.

RESPONSE: These will be produced.

25. All documents and things referring or relating to Applicant's use of Applicant's mark in April 1982.

RESPONSE: These will be produced.

26. All documents and things referring to market studies conducted by or on behalf of Applicant regarding Applicant's Mark, or goods and services intended to be distributed by Applicant in association with Applicant's Mark.

RESPONSE: Defendant cannot locate such documents as yet. An investigation is continuing.

27. All documents and things referring or relating to surveys conducted by or on behalf of Applicant concerning Applicant's Mark, or goods and services intended to be distributed by Applicant in association with Applicant's Mark.

RESPONSE: Defendant cannot locate such documents as yet. An investigation is continuing.

28. All documents and things referring or relating to agreements negotiated and/or entered into by Applicant relating to Applicant's Mark, including, but not limited to, assignments, licenses, permissions, or consents.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced.

29. All documents and things referring or relating to transfer of ownership of Applicant's Mark from Portals Plus to H&C Milcor.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced subject to redaction of irrelevant information.

30. All documents and things referring or relating to transfer of the application for Applicant's Mark from Portals Plus to H&C Milcor.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced subject to redaction of irrelevant information.

31. All documents and things referring or relating to any litigation or administrative proceeding relating to Applicant's Mark.

RESPONSE: None, other than Trademark Application, U.S. Serial No. 76/461,157, Filed: October 18, 2002.

32. All documents and things referring or relating to communication with any expert or potential expert contacted by or on behalf of Applicant regarding this opposition proceeding, including, but not limited to, curriculum vitae and reports by said expert.

RESPONSE: None at present; investigation continues.

33. All documents and things referring or relating to the specimens submitted by Applicant in Applicant's application.

RESPONSE: These will be produced.

34. All documents and things referring or relating to Applicant's Mark.

RESPONSE: These will be produced.

35. All documents and things referring or relating to the change of H&C Milcor, Inc. to Hart & Cooley, Inc.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protective Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced

36. All documents and things referring or relating to transfer of the application for Applicant's Mark from H&C Milcor, Inc. to Hart & Cooley, Inc.

RESPONSE: Objection; Trade Secret/Commercially Sensitive, not to be disclosed to the parties under the Protective Order in place by outside counsel and subject to these restrictions. Subject to classification under the Protections.

tive Order and the August 31, 2007 changes to 37 CFR 2.116(g), and the overbroad nature of the request, these documents will be produced

37. All documents and things relating to an affidavit under 37 C.F.R. 2.41(b), dated October 16, 2002, filed in Applicant's Application relating to prosecution of Applicant's Mark, the documents and things including, but not limited to, Exhibits A through T.

ANSWER: Please be more specific.

Respectfully submitted,

Dillis V. Allen Reg. No. 22,460

Attorney for H&C Milcor, Inc.

Dillis V. Allen, Esq. 105 S. Roselle Road Suite 101 Schaumburg, IL 60193 847/895-9100

#### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing H&C MILCOR, INC.'S RESPONSES TO OPPOSER'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS was served upon the following counsel of record, via Federal Express, on the 9th day of July, 2008:

Terence J. Lin, Esq. Van Dyke, Gardner, Linn & Burkhart, LLP 2851 Charlevoix Drive SE, Suite 207 P.O. Box 888695 Grand Rapids, MI 49588-8695

Dillis V. Allen

Dillis V. Allen, Esq. 105 S. Roselle Road Suite 101 Schaumburg, IL 60193 847/895-9100

UNITED STATES PATENT AND TRADEMARK OFFICE Trademark Trial and Appeal Board P.O. Box 1451 Alexandria, VA 22313-1451

Mailed: December 20, 2010
Opposition No. 91182064
AS Holdings, Inc.

v.

H & C Milcor, Inc., f/k/a Aquatico of Texas, Inc.

#### George C. Pologeorgis, Interlocutory Attorney:

This case now comes up for consideration of opposer's motion (filed December 9, 2009) to strike applicant's

Exhibits 16-22 and all testimony related to Exhibits 16-22, including without limitation the related testimony of Sean Steimle and Lawrence Devitt. The motion is fully briefed.

The Board, in its discretion, suggested that the issues raised in opposer's motion should be resolved by telephonic conference as permitted by TBMP § 502.06 (2<sup>nd</sup> ed. rev. 2004). The Board contacted the parties to discuss the date and time for holding the phone conference.

The Board initially held a telephone conference with the parties regarding opposer's motion to strike on April 29, 2010. During that conference, opposer withdrew its Opposition No. 91182064

objections to Exhibits 17, 19, and 22 and any testimony related thereto. Accordingly, opposer's motion to strike has been given no further consideration with regard to applicant's Exhibits 17, 19, and 22 and any testimony in relation thereto. The Board, however, could not make a final disposition regarding the objections to the remaining exhibits and related testimony and required the parties to submit supplemental information and papers. The parties provided the requested supplementation of documents.

The Board conducted a follow-up telephone conference at 11 a.m. Eastern time on Monday, December 20, 2010. The conference was held as scheduled among Terence J. Linn, as counsel for opposer, Dillis V. Allen, as counsel for applicant, and the above signed, as a Board attorney responsible for resolving interlocutory disputes in this case.

The Board carefully considered the arguments raised by the parties, as well as the supporting correspondence and the record of this case, in coming to a determination regarding the above matters. During the telephone conference, the Board made the following findings and determinations:

#### Opposer's Motion to Strike

#### Exhibit 16

Opposer's motion to strike is granted with regard to applicant's Exhibit 16. Exhibit 16 and any testimony made in relation thereto are stricken from the record.

#### Exhibit 18

Opposer's motion to strike is denied with regard to applicant's Exhibit 18. Exhibit 18 and any testimony in relation thereto remains part of the record.

#### Exhibit 20

Opposer's motion to strike is granted to the extent that Appendix Nos. 23 and 25 of applicant's Exhibit 20, as well as any testimony in relation to Appendix Nos. 23 and 25, to the extent there is any, are stricken from the record.

#### Exhibit 21

Opposer's motion to strike is granted to the extent that

Appendix Nos. 26 and 33-36 of applicant's Exhibit 21, as well

as any testimony in relation to Appendix Nos. 26 and 33-26, to

the extent there is any, are stricken from the record.

During the course of the December 20, 2010 telephone conference, opposer's counsel advised that opposer would not pursue rebuttal testimony. Accordingly, proceedings herein

Opposition No. 91182064

are resumed and the case will proceed to final briefing upon the schedule set forth below:

Opposer's brief due:

February 25, 2011

Applicant's brief due:

March 28, 2011

Opposer's reply brief, if filed, due: April 12, 2011

An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.1

<sup>1</sup> As a reminder, in each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of taking of testimony. Trademark Rule 2.125. Moreover, all trial testimony depositions that are taken in a Board inter partes proceeding must be filed with the Board, and, when filed, automatically constitute part of the evidentiary record in the proceeding. The Board will accept transcripts of testimony depositions at any time prior to the submission of the case for final decision.

# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| AS HOLDINGS, INC. | )   | RECEIVED     |
|-------------------|---|--------------|
| Opposer,          | )<br>)  | DEC 0 3 2009 |
| v.                | ) Opposition No. 91182064                                 | D.V. ALLEN   |
|                   | ) Serial Number: 76/461,157 ) Mark: Miscellaneous Design: |              |
| Applicant.        | (Pipe Boot Product Design)                                |              |

# OPPOSER'S MOTION TO STRIKE EXHIBITS AND TESTIMONY FOR IMPROPER DISCLOSURE AND FAILURE TO DISCLOSE

Opposer, AS Holdings, Inc., hereby moves to strike the following exhibits and testimony:

Applicant Defendant's Exhibits 16 – 22; and all testimony relating to Exhibits 16 - 22, including without limitation the related testimony of Sean Steimle (testimonial deposition dated November 12, 2009, page 5 line 22 to page 12 line 7; and page 13 line 13 to line 23) and Lawrence Devitt (testimonial deposition dated November 12, 2009, page 4 line 17 to page 8 line 24; page 39 line 6 to line 22).

The basis for this motion is that Defendant's Exhibits 16 - 22 were not identified in Applicant Defendant's Pretrial Disclosures. These exhibits were not produced by Applicant to Opposer prior to the testimonial depositions during which Applicant belatedly identified these exhibits, namely the testimonial depositions of Sean Steimle and Lawrence Devitt conducted November 12, 2009. Copies of these exhibits were first provided to Opposer's counsel on November 30, 2009. The exhibits and related testimony should be stricken pursuant to Trademark Rules 2.123(e)(3) and 2.121(e). A memorandum in support of this motion is submitted herewith.

Respectfully submitted,

Dated: December 1, 2009

Terence J. Linn/

Matthew D. Kendall-

Van Dyke, Gardner, Linn & Burkhart, LLP 2851 Charlevoix Drive SE, Suite 207

Grand Rapids, MI 49546

(616) 975-5500

#### **CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2009, a true and correct copy of Opposer's Motion to Strike Exhibits and Testimony for Improper Disclosure and Failure to Disclose and Memorandum in Support of Its Motion was sent by first class mail, postage prepaid, to Attorney for Applicant as follows:

Dillis V. Allen 105 S Roselle Rd, Suite 101 Schaumburg, IL 60193

Terence J. Lina

# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| AS HOLDINGS, INC.       |  |
|-------------------------|--|
| Opposer,                |  |
| v.                      | Opposition No. 91182064                                |
| H&C MILCOR, INC. f/k/a  | )  |
| AQUATICO OF TEXAS, INC. | Serial Number: 76/461,157                              |
| Applicant.              | Mark: Miscellaneous Design: (Pipe Boot Product Design) |

# OPPOSER'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE EXHIBITS AND TESTIMONY FOR IMPROPER DISCLOSURE AND FAILURE TO DISCLOSE

Opposer, AS Holdings, Inc., has moved to strike (1) Applicant Defendant H&C Milcor, Inc.'s (hereinafter "Milcor" or Applicant) testimonial deposition Exhibits 16-22 which were neither identified in Defendant's Pretrial Disclosures nor produced during discovery, and (2) the testimony of Sean Steimle (testimonial deposition dated November 12, 2009, page 5 line 22 to page 12 line 7, and page 13 line 13 to line 23) and testimony of Lawrence Devitt (testimonial deposition dated November 12, 2009, page 4 line 17 to page 8 line 24, page 39 line 6 to line 22) relating to those exhibits.

#### Background

A copy of Applicant H&C Milcor, Inc. f/k/a Aquatico of Texas, Inc. Pretrial Disclosures is attached hereto as Motion Exhibit A. The Certificate of Service mailing date for those pretrial disclosures is dated October 16, 2009. Applicant's Pretrial Disclosure stated the following with regard to exhibits (pages 4-5):

Applicant intends to rely on or may rely on the Exhibits listed in the Opposer, AS HOLDINGS, INC'S Pretrial Disclosures, and additionally may rely on the deposition witnesses and exhibits also listed in Opposer, AS HOLDINGS, INC.'s

Pretrial Disclosures, and also may rely on further Exhibits that may be produced at trial. These latter Exhibits will be provided to Opposer's attorney either in advance of the testimony of the individual witnesses or may be contemporaneously provided as the testimony of the individual witnesses progresses.

By letter dated October 22, 2009, a copy of which is attached as Motion Exhibit B,

Opposer objected to Applicant's Pretrial Disclosures as improper and inadequate. In that
objection of Motion Exhibit B Opposer specifically objected to documents and exhibits not
specifically identified in Applicant's Pretrial Disclosures, and in particular to any document or
exhibit that Applicant purportedly intended to be utilized under Applicant's reference to further
exhibits that may be produced at trial, but which were not identified in any fashion in
Applicant's Pretrial Disclosures.

On November 12, 2009 Applicant conducted the testimonial deposition of Sean Steimle and Lawrence Devitt. Pursuant to agreement between the parties, Opposer attended that deposition via telephone. No exhibits were provided to Opposer prior to those depositions. During the testimonial depositions of Sean Steimle and Lawrence Devitt Applicant identified new Applicant Defendant's Exhibits 16 - 22. At that time Applicant elicited testimony over the objection of Opposer from Mr. Steimle regarding new exhibits 16-18. (See attached Motion Exhibit C, Steimle testimonial deposition November 12, 2009, page 5 line 22 to page 12 line 7, and page 13 line 13 to line 23.) During the deposition of Lawrence Devitt, Applicant identified additional new Defendant's Exhibits 19-22, and over Opposer's objection elicited testimony regarding the new exhibits. (See attached Motion Exhibit D, Devitt testimonial deposition November 12, 2009, page 4 line 17 to page 8 line 24, page 39 line 6 to line 22.) At that time Opposer objected to the newly identified exhibits which had not been listed on Applicant's Pretrial Disclosures. (See continuing objection at Motion Exhibit C, Steimle deposition pages 7,

10-11, and Motion Exhibit D, Devitt deposition pages 5-7.)

During the discovery period of this proceeding Opposer served Opposer's First Set of Requests for Production of Documents and Things on Defendant Applicant Milcor. A copy of Applicant Defendant Milcor's responses to Document Requests 1, 21, 28 and 34 are attached as Motion Exhibit E. In particular, Request 21 requested documents relating to third parties' use of the mark sought to be registered.

On November 24, 2009, Opposer's counsel received a copy of the Steimle and Devitt transcripts which included Opposer's objections, but copies of Applicant Defendant's Exhibits 16-22 were not then received. (See attached Motion Exhibit F, email exchange with reporter service re copies of exhibits.) For the first time counsel for Opposer obtained copies of newly identified Applicant Defendant's Exhibits 16-22 on November 30, 2009. Opposer promptly filed the present motion.

#### Discussion

The rule changes to the Trademark Rules, and the requirement of Pretrial Disclosures, are applicable to opposition proceedings commenced on or after November 1, 2007. 37 C.F.R. § 2.121(e); Jules Jurgensen/Rhaphsody Inc. v. Baumberger, 91 USPQ2d 1443, 1444 (TTAB 2009). This opposition was initiated after November 1, 2007 and therefore the revised trademark rules are applicable to this proceeding.

Trademark Rule 2.121(e) requires pretrial disclosures. Trademark Rule 2.121(e) establishes that pretrial disclosures as to witnesses and exhibits is mandatory: "the party scheduled to present evidence <u>must</u> disclose the name and, if not previously provided, the telephone number and address of each witness from whom it intends to take testimony, or may take testimony if the need arises and a general summary or list of the types of documents and

things which may be introduced as exhibits during testimony of the witness." (emphasis added.)

Trademark Rule 2.123(e)(3) provides that if pretrial disclosures are "improper or inadequate" with respect to a witness the adverse party may cross-examine that witness under protest while reserving the right to object to the receipt of the testimony in evidence. *Jules Jurgensen/Rhaphsody Inc. v. Baumberger*, 91 USPQ2d 1443, 1444 (TTAB 2009).

None of Applicant Defendant's Exhibits 16-22 were identified in Applicant's Pretrial Disclosures. Moreover, these exhibits were not produced during the discovery phase of this proceeding.

The testimony introduced by Opposer was originally conducted as discovery depositions taken of Mr. Steimle by Opposer, and several witnesses of Opposer that were deposed by Applicant. By agreement between the parties these discovery depositions were to be used as trial testimony. That testimony taken during the discovery period included testimony directed to the pipe boots of third party Firestone. (See trial testimony previously submitted June 26, 2009, Michael Hubbard Deposition November 13, 2008 pgs 31, 35-37, 41-42, 77-79; and of Chris Kintzele Deposition November 12, 2008 pgs 10-12.) Applicant and its counsel were well aware of that testimony during the discovery phase of this proceeding and cannot now claim some form of surprise as to the testimony or evidence that Opposer submitted. To the extent that Applicant may have believed that additional documents or evidence may be necessary to respond to any of this testimony, Applicant had more than ample opportunity to produce that information and documents during the discovery phase and thus provide Opposer with the opportunity for conducting discovery and evaluation of those documents for purposes of Opposer's own testimony in chief. Applicant likewise was well aware of that prior testimony when Applicant prepared and served its Pretrial Disclosures.

Moreover, during the discovery phase of this proceeding Opposer took the discovery deposition of Applicant H&C Milcor, Inc. pursuant to Fed.R.Civ.P. 30(b)(6) with Mr. Sean Steimle provided as the representative deponent. During the course of that discovery deposition counsel for Opposer discussed with counsel for Applicant the production of sales information and documentation for years other than 2007 and 2008. (Steimle Deposition October 3, 2008 pp. 72-74; submitted during Opposer's case in chief on June 26, 2009.), and Counsel for Applicant represented that Applicant would not produce more documents that had not been previously produced and attempt to use those documents at trial. (Steimle Deposition October 3, 2008 pp. 73-74.) Opposer relied upon that representation. In particular Applicant's new Defendant's Exhibit 18 consists of selected sales invoices from 2005 and 2006.

Now Applicant, contrary to its representations made during the discovery phase, is producing new documents which had previously not been produced and is attempting to introduce them as evidence in this proceeding. In particular, these documents allegedly relate in some fashion to third party use of the subject mark, by the third party Firestone. (See Motion Exhibit E, Request for Production no. 21.) Not only did Applicant not identify these documents and information, but is doing so in violation of its prior representations to Opposer's counsel.<sup>1</sup>

Accordingly, Applicant Defendant's Exhibits 16-22 should be precluded from entry into the record and/or stricken from the record in the event Applicant files the same. All testimony by Applicant's witnesses, namely Mr. Steimle and Mr. Devitt, regarding those exhibits should likewise be precluded from entry in the record and/or stricken from the record in the event that Applicant attempts to file the same. This would include the exclusion and/or striking of the following pages of the testimonial deposition of Sean Steimle dated November 12, 2009: page 5

<sup>&</sup>lt;sup>1</sup> It should be noted, as well, that Applicant's Pretrial Disclosures do not identify Mr. Steimle as potentially testifying as to sales of pipe boots.

line 22 to page 12 line 7; and page 13 line 13 to line 23; and the following pages of the testimonial deposition of Lawrence Devitt dated November 12, 2009: page 4 line 17 to page 8 line 24; page 39 line 6 to line 22.

In view of the above, Opposer's Motion should be granted.

Dated: December 1, 2009

Respectfully submitted,

Terence J. Linn

Matthew D. Kendall

Van Dyke, Gardner, Linn & Burkhart, LLP

2851 Charlevoix Drive SE, Suite 207

Grand Rapids, MI 49546

(616) 975-5500

Attorneys for Opposer

# Firestone

# SPECIALTY PRODUCTS

|      | Alph          | Systems           |           |         | <u> </u>       |                  |
|------|---------------|-------------------|-----------|---------|----------------|------------------|
| From | n: Paul       | E. Oliveira       |           | Date: 7 | 7/19/2006      |                  |
| Re:  | EPD/v<br>,etc | NPipe Seal with t | ape Specs | Pages:  | 21             |                  |
| cc:  | Mark          | Munley            |           |         |                |                  |
| □ Ur | gent          | ☑ For Review      | ☐ Please  | Comment | ☐ Please Reply | □ Please Recycle |

Attached please find our purchasing specifications for our EPDM Pipe Flashings and

QuickSeam Pipe Flashings, Pipe Flashing Clamps and our TPO Pipe Boots.

Please note the physical property and warranty requirements for all of the products

including the clamping rings.

I believe this should give you all the information needed to quote and sample

Firestone with parts produced by your company.

If you have any questions call me at my office 1-317-575-7186.

Thanks,

AS HOLDINGS vs. H&C MILCOR Opposition No. 91182064 Serial No. 76/461,157 Deft. No. 14

ALP00529

APPL. APP. 79

## PRODUCT SPECIFICATION FOR **EPDM PIPE FLASHINGS** AND QUICKSEAM PIPE FLASHINGS

Prepared By:

Wasita 1/9/04

Accessory Engineer

Approved By: <

Jeff Hehegar

Accessory and System Engineering Manager

Approved By:

Paul Oliveira,

Accessory Product Manager

07:11 900Z-61-7nc

# Product Specification For EPDM Pipe Flashings And QuickSeam Pipe Flashings

#### 1.0 Scope

1.1 This specification is for EPDM Pipe Flashings and QuickSeam Pipe Flashings which are to be used in conjunction with Firestone RubberGard® and Triumph Roofing Systems. The EPDM Pipe Flashing is a prefabricated pipe boot and the QuickSeam Pipe Flashing is a fabricated pipe boot that has a tape adhesive laminated to the bottom flange. Both boot types are to be used to flash pipes, rods or other similar penetrations on roofs. Both boot types can be used to flash a variety of pipe sizes from 1" O.D. to 6.875" O.D.

#### 2.0 Typical Physical Requirement

- 2.1 Pipe Flashings (W56-RAC-1033 and-1063) The pipe flashings shall be made of EPDM. Either Firestone Building Products Compound in acceptable. Any changes to an accepted compound must be submitted in writing to Firestone for approval before making the change.
- 2.2 QuickSeam Tape Material For the QuickSeam Pipe Flashing, the tape adhesive shall be \$2.510/10/16 Pipe For an alternate approved by Firestone.
- 2.3 Primer The QuickSeam tape shall be adhered to the pipe flashing with QuickPrime Plus or HSSP-1 primer.
- 2.4 Release Paper The tape shall be covered with a piece of Firestone approved release paper that extends from the inside edge of the tape to the outside edge. The paper shall have one full-width cut through it for ease of removal during installation.

#### 3.0 Physical Properties

- 3.1 The QuickSeam Pipe Flashing shall pass the dead load shear test when tested in accordance with the Test Specification W56-358-1002.
- 3.2 The EPDM compound used for pipe flashings must meet the minimum values as listed in B-1000 on Page 8 of this specification.

#### 4.0 Physical Dimensions

- 4.1 The pipe flashings shall conform dimensionally to Figure 3 of this specification and the requirements listed in the Quality Assurance Test Form on Page 6 of this specification.
- 4.2 The QuickSeam tape thickness shall be .030"-.040".
- 4.3 The QuickSeam tape shall be flush to 1/8" beyond the flange edge.

#### 5.0 First Article Submission and Inspections

5.1 Vendor shall submit to Firestone Technology one complete unit to this specification for First Article Inspection before production will be approved. The submission shall include a filled-out copy of the report form on page 6

ALP00531 APPL: APP. 81 of this specification or an alternate form approved by Firestone.

5.2 The vendor shall inspect finished pipe flashings at a frequency that will ensure Firestone receives only parts that meet this specification. A written certification indicating the lot number and test results shall be required with each shipment. Certification forms shall be sent to the attention of the Purchasing Agent.

5.3 Firestone may inspect samples of incoming material to assure that the product meets the requirements of paragraphs 2, 3, and 4.

#### 6.0 Packaging and Marking

6.2 The box used for packaging shall be approximately and for QuickSeam Pipe Flashings shall the approximately and for QuickSeam Pipe Flashings shall the approximately and prevent

the tape sticking to the inside of the box.

Box marking shall be by a label adhered to one side of the box and extending onto the top of the box. The label shall be a label in accordance with the label of the information from Table 2 of the labeling specification. An example of the Firestone label is shown in Figure 1, and the Triumph label in Figure 2. The "WARNING" information should go on the top of the box.

6.4 A date code (month and year) shall be molded on the top surface of the

pipe flashing flange.

6.5 A molded-in detail showing where to cut the pipe flashing for the desired pipe O.D. shall be molded on the top surface of the flange.

6.6 A date of packaging and lot number shall be ink stamped on the box for

traceability. Size of font shall be 16 minimum.

6.7 The letters "BFDP" and "EPDM" shall be molded on the body of the large diameter as shown by Note 1 in Figure 3. Letters shall be approximately 5/16" high, Arial font. The letter sets shall be centered with each other and spaced approximately 1/2" apart. The area containing the letters shall be rectangular unless otherwise approved.

#### 7.0 Warranty

7.1 Supplier shall warrant the workmanship and the integrity of the pipe flashings for a period of 20 years to perform as intended when installed in accordance with manufacturer's specifications.

### **WARNING:**

Do not store on roof in direct sunlight or at temperatures above 80°F (26.7°C). Keep box dry.

# Firestone

QuickSeam Pipe Flashing W56-RAC-1063

1" (2.5 cm) to 6" (15.2 cm) ID CUANTITY: 10 Fleshings and 10 Clamps, and instruction Sheet

Firestone

NOBODY COVERS YOU BETTER \*
SEC desprésaison lière.
Cames à 4 4003-5407

Made in U.S.A.

Figure 1 - Firestone Label

ALP00533 APPL. APP. 83

## **WARNING:**

Do not store on roof in direct sunlight or at temperatures above 80°F (26.7°C).

Keep box dry.

# Triumph

# QuickSeam Pipe Flashing W56-TRP-5761

1" (2.5 cm) = 6" (15.2 cm) (D QUANTITY: 10 Flashings and 40 Clamps, and Instruction Sheet



MOE Listed No.

alada in U.S.A.

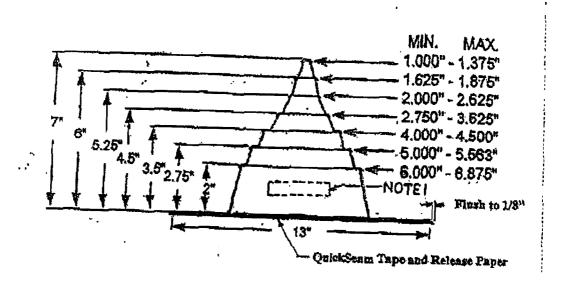
Figure 2 - Triumph Label

ALPOO 534 APPL. APP. 84

# EPDM PIPE FLASHING AND QUICKSEAM PIPE FLASHING TEST REPORT FORM

| Supplier  | Meterial                     |
|---|------------------------------|
| Date Assembled  |                              |
|   | Lot #                        |
|   | UIREMENTS FOR PIPE FLASHINGS |
| <u>Test</u>   | Specification                |
| Base Polymer  | 100 % EPDM                   |
| Color   | Black                        |
| Shore A Hardness (reading at 3 seconds)   |                              |
| <u>Dimensions (see Floure 3)</u> 1. (Thickness of flange and wall)  | 0.055" - 0.075"              |
| 2. (Flange OD)  | 13"                          |
| 3. (Legibility of date code and all printing on parts)  | Paragraph 6.4-6.7            |
| <ol> <li>(Voids, air traps, splits, pilting, cured in flash, or<br/>surface blemishes or blisters)</li> </ol> | ·                            |
| 5. (Tensile strength, room temperature)   | 1400 psl, minimum            |
| 3. (Elongation, room temperature)   | 350%, minimum                |
| 7. (Die C tear, room temperature)   | 190 lbf/in, minimum          |
| 3. (Tensile strength, after heat aging)*  | 1300 psi, minimum            |
| ). (Elongation, after heat aging)*  | 250%, minimum                |
| 0. (Die C tear, after heat aging)*  | 150 lbf/in, minimum          |
| 1. (Durometer, after heat aging)*   | 80 Shore A, maximum          |
| 2. (QuickSeam Dead Load Shear Test) slippage  | tess than 0.125"             |
| 3. (QuickSeam Tape Thickness)   | .030"040"                    |
| 4. (QuickSeam Tape beyond flange)   | Flush to 1/8"                |
| Perform heat age testing on pipe flashings quarterly  |                              |

ALP00535 APPL. APP. 85



#### NOTES:

- 1. "BFDP" and "EPDM" to be molded and spaced as shown by Detail "A".
- 2. Tolerance on dimensions shown is ±0.06" unless otherwise noted.
- 3. Drawing shown is for QuickSeam Pipe Flashing. EPDM Pipe Flashing does not have tape on the flange.

Detail "A"

Figure 3: QuickSeam Pipe Flashing Dimensions

#PPL. APP. 86

#### EPDM MATERIAL SPECIFICATIONS B-1000

| PROPERTY   | TEST METHOD                              | PERFORMANCE  |
|--|--|--|
| Specific Gravity Tensile Strength  | ASTM D-297<br>ASTM D-412 (Die C)         | 1.15 ± .05<br>1400 psi, minimum                      |
| Elongation   | ASTM D-412 (Die C)                       | (9.6 MPa)<br>350%, minimum                           |
| Tear Resistance  | ASTM D-624 (Die C)                       | 190 lbf/in, minimum                                  |
| Shore A Durometer Ozone Resistance 7 days @ 100pphm@ 100°F with 50%extension   | ASTM D-2240<br>ASTM D-1149               | (33.3 N/mm)<br>55 - 70<br>No Cracks                  |
| Heat Aging<br>28 days @ 240°F  | ASTM D-573                               |  |
| Tensile Strength   | ASTM D-412                               | 1300 psi, minimum                                    |
| Elongation<br>Tear Resistance  | ASTM D-412 (Die C)<br>ASTM D-624 (Die C) | (8.9 MPa)<br>250%, minimum<br>150 lbf/in, minimum    |
| Shore A Durometer Brittleness Temperature Resistance to Water change in weight after immersion   | ASTM D-2240<br>ASTM D-2137<br>ASTM D-471 | (26.3 N/mm)<br>80 maximum<br>-49°F (-46°C)<br>+8, -2 |
| 7 days @ 158°F, maximum, % Water Vapor Permeability, max., perm mils Tolerance on Nominal Thickness, % Pipe Flashing Composition Weight percent of Polymer that is EPDM, % | ASTM D-761<br>ASTM D-297                 | 2.0<br>· ± 10  |
| Weight percent of material that is EPDM Po   | lymer, %                                 | 100<br>30 minimum                                    |

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THIS REVISION SUPERSEDES ALL PREVIOUS ISSUES

1.13

# PRODUCT SPECIFICATION FOR

PIPE FLASHING CLAMPS

Prepared By:

William A. Waster 1/29/03
William A. Wasitis, Project Engineer

Approved By:

Paul Oliveira, Product Manager Accessories

1-29-03

ALPOOS38 APPL. APP. 88

3175757210 P.010

WARRANTY SERVICE

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Product Specification For Pipe Flashing Clamps

#### 1.0 Scope

1.1 This specification is for Firestone Pipe Flashing Clamps, which are to be used in conjunction with all Firestone Single Ply Roofing Systems. Pipe Flashing Clamps are metal fastening devices used to secure Pipe Flashings, QuickSeam Pipe Flashings and Conduit Flashings to circular roof penetrations, and are expected to perform for the life of the Pipe Flashing.

#### 2.0 Typical Physical Requirement

- 2.1 Pipe Flashing Clamps shall be of the closed drive screw.
- 2.2 Material Internal Shall be manufactured for the intended outside application for 20 years.

#### 3.0 Physical Dimensions

- 3.1 The width of the clamp band shall be a 9/16" minimum and shall conform to the dimensions as shown in Figure 1 of this specification.
- 3.2 The clamps supplied under this specification shall have the following clamping ranges and part numbers:
  - 3.2.1 UltraPly TPO and UltraPly 78 + Flashings 1-1/16" to 4" 300055111025

  - 3.2.3 Universal and Universal QuickSeam Flashings 1" 6.875" 6.875"
  - 3.3.4 Condult Flashing ½" 29/32" 63008H B 7/8"-2 %" 538329

#### 4.0 Inspection

- 4.1 The Pipe Flashing vendor shall certify that the clamps meet this specification. The certification shall be included with the pipe flashing certification.
- 4.2 Firestone may inspect samples of incoming material to assure that the product meets the requirements of paragraphs 2.0 and 3.0. Parts not in compliance shall be returned.

ALA00539 APPL. APP. 89

•::

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#### 5.0 Packaging and Source of Supply

- 5.1 Clamps shall be packaged loose, 10 clamps per carton, except for the Conduit Flashing, which shall have one 3 ¾ " x 3" x 6" box of 10 clamps each size (20 total) per carton.
- 5.2 Approved Source of Supply:

#### 6.0 Warranty

- 6.1 Clamps approved to this specification shall not be changed without the written approval of Firestone.
- 6.2 Clamps furnished to this specification shall be free of workmanship and material defects for a period of 20 years.

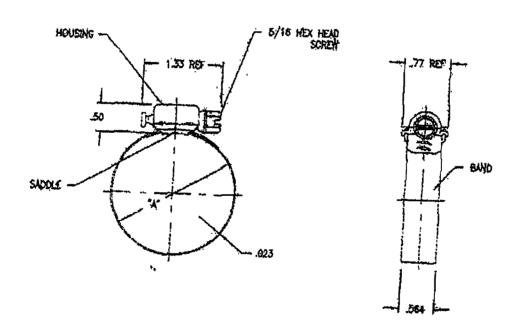


Figure 1: Clamp Dimensions

ALP00540 APPL. APP. 90 2002-61-700

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## PRODUCT SPECIFICATION

FOR

**ULTRAPLY TPO** 

SMALL AND LARGE PIPE BOOTS

\* See rute or 1.1

Prepared By:

Bill Wasitis 1/29/03

Approved By:

Richard Peng, Technical Director

Approved By:

1-05-03

Paul Oliveira, Product Manager Accessories

70C-13-2006 11:45

#### **Product Specification** for UltraPly TPO Small and Large Pipe Boots

#### 1.0 Scope

- 1.1 This specification is for UltraPly TPO Pipe Boots to be used with Firestone UltraPly TPO Roofing Systems. Base polymer and weatherability of the UltraPly TPO Pipe Boots shall be the same as the UltraPly TPO Unsupported Flashing.
- 2.0 Typical Physical Properties
  - 2.1 Base Polymer: Thermoplastic Polyolefin
  - 2.2 Color: White, Gray or Tan
  - 2.3 Dimensions
    - For Small Pipe Boot refer to Drawing W56-TPO-3012 on Page 8 a.
    - For Large pipe Boot refer to Drawing W56-TPO-3013 on Page 9
  - 2.4 Table I lists other physical properties for the UltraPly TPO Pipe Boots when tested in accordance with the respective ASTM test specification listed.

TABLE

|                                 | ADLE               |                                  |
|---------------------------------|--------------------|----------------------------------|
| Physical Properties -<br>Unaged | Test Method        | Specification                    |
| Thickness                       | None               | no non decide                    |
| Tensile Strength                | ASTM D-412         | as per drawing<br>2500 psi (min) |
| Elongation                      | ASTM D-412         | 500% (min)                       |
| Tear Resistance                 | ASTM D-624 (die C) | 250 lbs (min)                    |
| Low Temperature<br>Brittleness  | ASTM D-1790        | -40°F or lower                   |
| Water weight change ,           | ASTM D-570         | 10/ /                            |
| Shore A Durometer               | ASTM D-2240        | 4% (max)                         |
| Peel Strength                   | ASTM D-413-82      | 80 ±10 membrane tear             |

Physical Properties after Heat Aging 166 hours @ 240°F per ASTM

| Physical Properties - Aged | Took Made 1        | FO F PER ASTIVI D-5/3 |
|----------------------------|--------------------|-----------------------|
| Topollo Channel            |                    | Specification         |
| Tensile Strength           | ASTM D-412         | 2250 psi (min)        |
| Elongation                 | ASTM D-412         | 450% (min)            |
| Tear Resistance            | ASTM D-624 (die C) |                       |
|                            | (0.0 0)            | 225 lbs (min)         |

- 2.5 Clamps: Learnes and Learnes State State State Clamps, purchased from Bigger Indiana Property Control of Clamps, 15681-9594. Refer to Firestone Specification FBP-6090 for clamp details.

  - Small Pipe Boot Clamp Rai Number 601 Sally 1978

#### 3.0 Qualification Tests and First Article Inspection

- 3.1 Firestone shall conduct a series of qualification tests on each vendor's product. Successful passing of these tests shall qualify a vendor's product for use by Firestone. In addition, Firestone shall conduct such qualifications tests in-house as required to assure that a vendor's product continues to meet this product specification.
- 3.2 The qualification tests shall consist of the following as a minimum:
  - a. Tensile Strength per ASTM D-412
  - b. Elongation per ASTM D-412
  - c. Shore A Durometer per ASTM D-2240
  - d. Low Temperature Brittleness per ASTM D-1790
  - e. Peel Strength per ASTM D-413-82 conducted on 1" strip from the base flange of the UltraPly TPO Pipe Boot which is heat welded to Firestone UltraPly TPO membrane. Machine test speed shall be 2" per minute, 180° peel.
- 3.3 Prior to production vendor shall submit a complete unit for First Article Inspection by Firestone. The unit shall be representative of the final product, including the carton, label, marking, boots and clamps, unless otherwise specified by Firestone.

#### 4.0 Quality Assurance Tests

4.1 Quality Assurance Tests listed in Table II shall be performed as a minimum by Firestone.

TABLE II

|                   | IADLE II           |                 |
|-------------------|--------------------|-----------------|
| Physical Property | Test Method        | Specification   |
| Thickness         | none               | as per drawing  |
| Tensile Strength  | ASTM D-412         | 2500 psi (min)  |
| Elongation        | ASTM D-412         | 500% (min)      |
| Tear Resistance   | ASTM D-624 (die C) | 250 lbs (min)   |
| Dimensions        | ASTM D-751         | as per drawing  |
|                   |                    | do hai niamilid |

#### 5.0 Inspection

- 5.1 Unless otherwise specified in the purchase order, a certificate of compliance to this specification will be accepted for individual lot shipments in lieu of actual test values.
- 5.2 Firestone shall inspect samples of incoming material to assure that the product meets the requirements of section 4.0, Quality Assurance Tests.

#### 6.0 Reporting

- 6.1 All numeric data generated shall be recorded on the form provided in this specification or a certificate of compliance generated by the supplier and approved by Firestone.
- 6.2 One report form shall be used for each UltraPly TPO Pipe Boot tested. All test samples shall be retained for 30 days after testing.

### 7.0 Packaging and Marking

- 7.1 Packaging shall consist of 10 boots and 10 clamps per container. TOMBIDBALIO DOMBID AND AND DESCRIPTION OF THE PROPERTY OF THE clamps shall be placed on the inside of the pipe boot stack inside the carton.
- 7.2 Marking shall be a hot stamp on the flange of the UltraPly TPO Pipe Boot with the Firestone "Shield" and "TPO" in PMS -185 Red.
- 7.3 The mold form number shall be metal stamped 1/8" nominal height so that the number is visible on the top of the flange in one place.
- 7.4 Each package shall have a Firestone Type 1 Label attached with the information shown in Table III. Label Numbers assigned boots to this specification are as follows:
  - TPO Small Pipe Boot ~ Label No. 4
  - TPO Large Pipe Boot Label No. 5
  - TPO Gray Small Pipe Boot Label No. 9
  - TPO Gray Large Pipe Boot Label No. 10
  - TPO Tan Small Pipe Boot Label No. 11
  - TPO Tan Large Pipe Boot Label No. 12
- 7.5 Each package shall have a lot identification number either on a separate label adhered to the outside of the container or printed on the container a minimum size, 16 font.

8,0 WARRANTY.

8.1 SUPPLIER SHALL WARRANT THE WURKMAN SHIP AND INCERTING OF THE PIPE FLASHING FUR A DERLUD OF ZOYARIS TO PERRUZA AS INTENDED WHEN INSTALLOWS IN ACCORDANCE WITH MANUFACTRES SPECHTICATIONS .

### Table III - Type 1 Label

Required Field Firestone Logo in Red (size 48), PMS-185 Required Field Product Name and Color in parenthesis (other than white or black) first line, (Arial, 48, Black), second line (Arial, 44, Black) Required Field Product Number (Arial, 44, Black) Required Field Quantity (Arial, 12, Black) Optional Field Instructions (Arial, 12, Black) Required Field Building Products Logo (12, Red Firestone only) Required Field Nobody Covers You Better Logo (Arial, 10, Black) Required Field Address (Arial, 10, Black) Required Field Label Design Date and No. (left side), (Arial, 6, Black) Required Field Made in U.S.A. (right side), (Arial, 10 Bold, Black)

Example Type 1 Label (not to size)

# Firestone

UltraPly TPO - Gray Molded Pipe Boots (Large) W56-TPO-G013

> Quentity: 10 Soots a10 Clamps Fits 4" (101.5mm) to 8" (203.2mm) Outside Discheters

> > Firestone

·Wiede B

MOBOLY COVERS YOU BETTER \*

826 Congressional Dire.
Cornel Di Antonoma

Mpor to U.S.A

ALPOD545 APPL:APP. 95

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# UltraPly TPO Small and Large Pipe Boot Qualification Test Report Form

| Supplier    | Material  |  |
|-------------|-----------|--|
| Date tested | Tested by |  |

## QUALIFICATION TESTS

| Unaged Physical Properties  | Sample 1 | Sample 2 | Accepted Value |
|-----------------------------|----------|----------|----------------|
| Thickness                   |          |          | <del></del>    |
| Dimensions                  |          |          | as per drawing |
| Tensile strength            |          |          | as per drawing |
|                             |          |          | 2500 psi (min) |
| Elongetion                  |          |          | 500% (min)     |
| Tear resistance             |          |          | 250 lbs (min)  |
| Low temperature brittleness |          |          | -40°F or lower |
| Water weight change         |          |          | 4% (max)       |
| Shore A durometer           |          |          |                |
| Peel strength               |          |          | 80 ±10         |
| 2.2.2.18(1)                 |          |          | membrane tear  |

Physical Properties after Heat Aging 166 hours @ 240°F per ASTM D-573

| Aged Physical Properties    | Sample 1 | Sample 2 | Accepted Value |
|-----------------------------|----------|----------|----------------|
| Tensile Strength Elongation |          |          | 2250 psi (min) |
| Tear Resistance             |          |          | 450% (min)     |
| T. HOUSE                    |          |          | 225 lbs (min)  |

ALP00546 APPL. APP. 96

W56-TPO-3012, -3013 Issued November 12, 1998 Revised January 28, 2003 Page 7 of 9

# UltraPly TPO Small and Large Pipe Boot Quality Assurance Test Report Form

| Supplier    | Material  |   |
|-------------|-----------|---|
| Date tested |           |   |
|             | Tested by | ` |

## PHYSICAL REQUIREMENTS

| Unaged Physical<br>Properties | Sample 1 | Sample 2 | Accepted Value |
|-------------------------------|----------|----------|----------------|
| Thickness                     |          |          |                |
| Dimensions                    |          |          | as per drawing |
| Tensile strength              |          |          | as per drawing |
| Elongation                    |          |          | 2500 psi (min) |
| Tear resistance               |          |          | 500% (min)     |
|                               |          |          | 250 lbs (min)  |

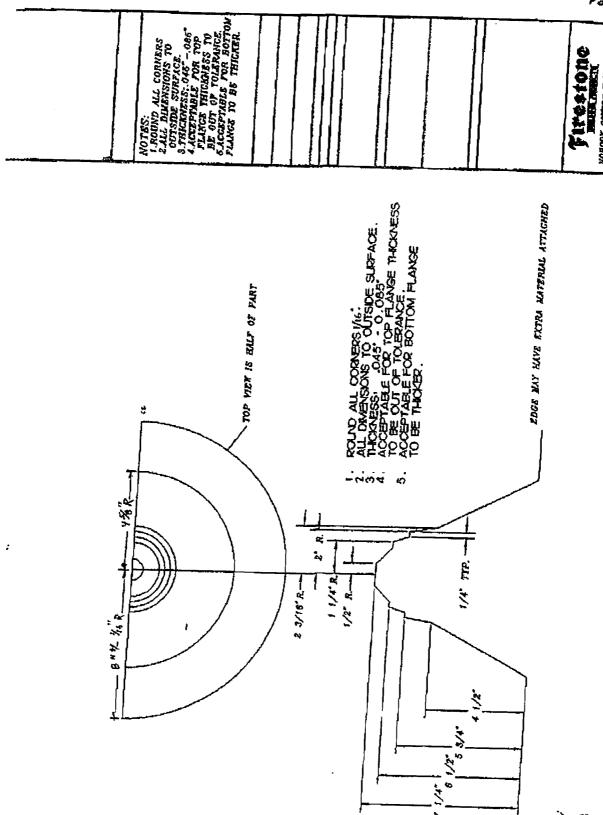
ALFO0547 APPL. APP. 96a

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Nobody Coters fou Better

ULTRAPLY TPO SWALL PIPE BOOT

N56-TP0-3012

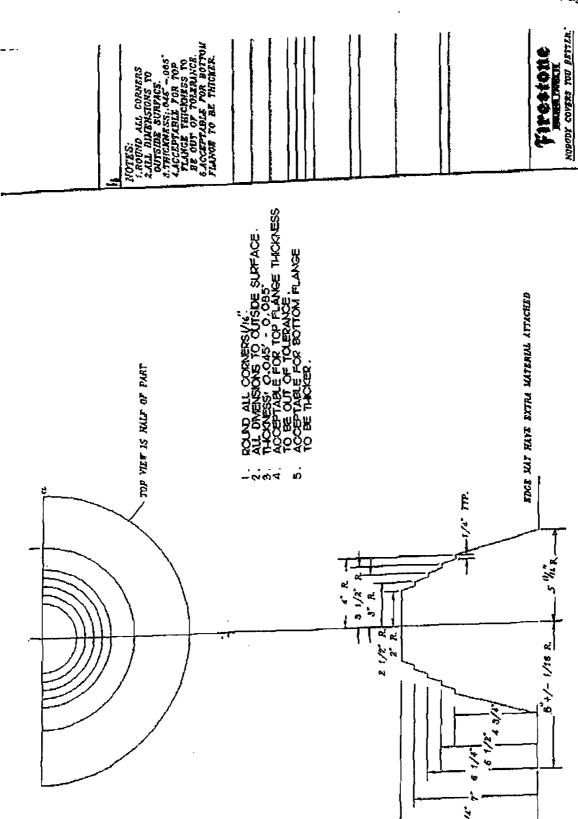


ALP00548 APPL. APP. 97

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ULTRAPLY TPO LARGE PIPE BOOT

N56-TP0-3013



ALPOO54 APPL. APP. 98 2007-61-700

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| AS HOLDINGS, INC.,                                 | ROPY                           |
|--|--------------------------------|
| Plaintiff;   | )                              |
| -vs-   | ) Opposition<br>) No. 91182064 |
| H&C MILCOR, INC. f/k/a<br>AQUATICO OF TEXAS, INC., | )                              |
| Defendant.   | )<br>)                         |

The testimonial deposition of SEAN STEIMLE, called by the defendant for examination, pursuant to notice and pursuant to the provisions of the Civil Practice Act of the State of Illinois and the Rules of the Supreme Court thereof pertaining to the taking of depositions for the purpose of evidence, taken before DEBORAH TYRRELL, a Certified Shorthand Reporter and a Notary Public within and for the County of DuPage and State of Illinois, at 815 Kimberly Drive, Carol Stream, Illinois, on the 12th day of November, 2009, at the hour of 11:30 a.m.

METRO REPORTING SERVICE, LTD. (630) 690-0050

APPL. APP. 100

. ..... COLL CASEN METUNIERS PAPER & MFG. CO. 800-626-6313

APPL. APP. 101

FORM CSR - LASER REPORTERS PAPER & MFG. CO. 800-626-6313

|    | WITNESS: SEAN STEIMLE 5                              |
|----|--|
| 1  | Q Okay. Now, give us a little bit more               |
| 2  | specific description of what you do with respect to  |
| 3  | the Portals Plus Products.                           |
| 4  | A I manage the sales force and the operations        |
| 5  | for Portals Plus and I have responsibility for the   |
| 6  | financials.  |
| 7  | Q Operations includes manufacturing?                 |
| 8  | A That is correct. Manufacturing, assembly,          |
| 9  | supply chain.  |
| 10 | Q Okay. Mr. Linn was nice enough after some          |
| 11 | persuasion to give me these exhibits. And I am going |
| 12 | to show you a pipe boot, that is identified as       |
| 13 | Exhibit 4. I am going to ask you if you recognize    |
| 14 | that pipe boot?                                      |
| 15 | A Yes, I do recognize that pipe boot.                |
| 16 | Q What is it?  |
| 17 | A It is a private label Firestone pipe boot          |
| 18 | that our company manufactures.                       |
| 19 | Q You manufactured that specific boot for            |
| 20 | Firestone?   |
| 21 | A That is correct.                                   |
| 22 | Q Alright. Now you provided us today with a          |
| 23 | mold insert and I am going to hand it to you and you |
| 24 | tell me what that is.                                |

METRO REPORTING SERVICE, LTD.

(630) 690-0050 APPL. APP. 102

| 4   | A It is our insert for our                            |
|-----|---|
| 2   | MR. LINN: Before you do that, I would like            |
| 3   | to interpose an objection as to this not having been  |
| 4   | previously identified or produced and we would object |
| 5   | and ultimately we will move to strike. You can        |
| 6   | proceed, though.                                      |
| 7   | MR. ALLEN: Thank you.                                 |
| 8   | THE WITNESS: Can you repeat the question              |
| 9   | again, please?  |
| 10  | BY MR. ALLEN:   |
| 11  | Q Can you identify that insert?                       |
| 12  | A Yes. This is an insert for our private              |
| 1.3 | label brandied for Firestone.                         |
| 14  | Q What does it say on it in terms of alpha or         |
| 15  | numeric information?                                  |
| 16  | A BFDP EPDM. B as in boy, F as in Frank, D            |
| 17  | as in dog, and P as in Paul.                          |
| 18  | Q Let me ask you. Was that insert used to             |
| 19  | make the letter, BFDP EPDM, on Exhibit 4 Firestone    |
| 20  | pipe boot?  |
| 21  | A Yes, that is correct.                               |
| 22  | MR. ALLEN: Now, I am not going to attempt             |
| 23  | to Terry, I am not they might want to use this        |
| 24  | insert so what I did is I took some victures.         |

|     | MR. LIME: Indominant to the pactures ar              |
|-----|--|
|     | well. Can you just give me a continuing objection to |
| (*) | any and all new material that you are producing that |
| 4   | were not specifically listed on your pre-trial or    |
| 5   | previously produced? That way I don't have to keep   |
| 6   | interrupting you with that objection.                |
| 7   | MR. ALLEN: You absolutely have that,                 |
| 8   | Terry.   |
| 9   | MR. LINN: Thank you, very much.                      |
| 10  | BY MR. ALLEN:  |
| 11  | Q I am handing you two photographs that I            |
| 12  | took of the insert yesterday. They are eight-by-ten  |
| 13  | prints. I ask you if that accurately reflects the    |
| 14  | insert that I previously showed you?                 |
| 15  | A That is correct. That is a picture of our          |
| 16  | insert   |
| 17  | Q Alright.   |
| 18  | A for Firestone pipe boots.                          |
| 19  | MR. ALLEN: I ask that the reporter mark              |
| 20  | those as Defendant's Group 16.                       |
| 21  | (Exhibit marked as requested.)                       |
| 22  | BY MR. ALLEN:  |
| 23  | Q I also yesterday photographed with a micro         |
| 24  | lens the BFDP logo on Exhibit 4 Firestone. I am      |

|    | WITNESS: SEAN STEIMLE 8                              |
|----|--|
| 1  | going to hand you these photographs. There is two of |
| 2  | them. I ask if you can give me a conclusion as to    |
| 3  | whether they are actual photographs of the logo that |
| 4  | appears on Exhibit 4?                                |
| 5  | A Yes, they are the pictures of the boot that        |
| 6  | is in Exhibit 4. You can see the label from the      |
| 7  | legal Exhibit 4 on the pictures and the replica of   |
| 8  | the boot insert.                                     |
| 9  | MR. ALLEN: Alright. I will give these to             |
| 10 | the reporter and ask her to mark these Defendant's   |
| 11 | Group Exhibit 17.                                    |
| 12 | (Exhibit marked as requested.)                       |
| 13 | MR. ALLEN: There is already an exhibit               |
| 14 | that shows a close up of that same thing but it is   |
| 15 | not a very good one so I took them over again.       |
| 16 | MR. LINN: Okay. I am not aware of any                |
| 17 | photos of any kind of insert being made.             |
| 18 | MR. ALLEN: I will identify it for you.               |
| 19 | Here it is. It's Exhibit 6.                          |
| 20 | MR. LINN: I am looking at Exhibit 6 and it           |
| 21 | is as photograph of a pipe boot.                     |
| 22 | MR. ALLEN: Right, that is what Exhibit 17            |
| 23 | is.  |
| 24 | MR. LINN: Alright. I understood it to be             |

METRO REPORTING SERVICE, LTD. (630) 690-0050

|     | WITNESS: SEAN STEIMLE 9                              |
|-----|--|
| 1   | a photograph of an insert.                           |
| 2   | MR. ALLEN: No. It is a photograph of the             |
| 3   | result of the insert on the pipe boot.               |
| 4   | MR. LINN: Okay.                                      |
| 5   | MR. ALLEN: Do you see what I am saying?              |
| 6   | MR. LINN: I am looking at the photograph             |
| 7   | and I understand what you are saying.                |
| 8   | MR. ALLEN: Okay. Fine.                               |
| 9   | MR. LINN: Thank you.                                 |
| 10  | MR. ALLEN: My pictures on 17 are better.             |
| 11  | I don't know who took Exhibit 6. It wasn't me I      |
| 12  | don't think. Maybe it was. Okay.                     |
| 13  | BY MR. ALLEN:  |
| 1.4 | Q Now, Mr. Steimle, I am going to show you a         |
| 15  | plurality of exhibits or invoices rather that are    |
| 16  | dated '06, '05. They appear to be just '06 and '05.  |
| 17  | These invoices portend to be invoices from Portals   |
| 18  | Plus to Firestone for pipe boots. I am going to hand |
| 19  | these to Mr. Steimle and ask him if he can identify  |
| 20  | those invoices?                                      |
| 21  | A Yes. They are Portals Plus invoices, part          |
| 22  | of Hart and Cooley, to Firestone. And we still have  |
| 23  | invoices to Firestone to present through 2009.       |
| 14  | Q So you're still presently selling to               |

|    | TO THE STATE OF TH |
|----|--|
| 1  | A That is correct.   |
| 2  | Q Firestone. This same product we're   |
| 3  | looking at Exhibit 4?  |
| 4  | A The same product in Exhibit 4 I would have   |
| 5  | an invoice in the last three weeks that would  |
| 6  | represent that to Firestone.   |
| 7  | Q And these invoices here do they relate at  |
| 8  | least in part to the Exhibit 4 pipe boot, which is   |
| 9  | characterized in the literature and in the testimony   |
| 10 | as the medium pipe boot?   |
| 11 | A That is correct.   |
| 12 | MR. LINN: Objection as to form; leading.   |
| 13 | MR. ALLEN: Okay.   |
| 14 | THE WITNESS: Should I respond to that?   |
| 15 | MR. ALLEN: No. We will hand these to the   |
| 16 | reporter and ask that she mark that as Defendant's   |
| 17 | Group Exhibit 18.  |
| 18 | (Exhibit marked as requested.)   |
| 19 | MR. LINN: I just want to make sure I have  |
| 20 | a continuing objection to any new exhibits that are  |
| 21 | not expressly listed on the pre-trial order or   |
| 22 | pre-trial  |
| 23 | MR. ALLEN: Disclosures.  |
| 24 | MR. LINN: It's called yes.   |

|     | WITNESS: SEAN STEIMLE 11                              |
|-----|---|
| 1   | MR. ALLEN: Disclosures.                               |
| 2   | MR. LINN: Yes. Pre-trial disclosures.                 |
| 3   | Just confirm I have a continuing objection to any     |
| 4   | MR. ALLEN: We agree with that.                        |
| 5   | MR. LINN: Okay. Very good.                            |
| 6   | (Whereupon, a discussion was held                     |
| 7   | off the record.)                                      |
| 8   | MR. LINN: Madam Reporter, are you getting             |
| 9   | all this down?  |
| 10  | THE COURT REPORTER: No. I was marking the             |
| 1.1 | exhibits.   |
| 12  | MR. LINN: Can you get this down? There's              |
| 13  | interrogation of the witness going on and I can       |
| 14  | barely hear it.                                       |
| 15  | MR. ALLEN: I can tell you what we were                |
| 16  | talking about. We were not trying to fool you. If I   |
| 17  | wanted to talk off the record, I would take him out   |
| 18  | of the room or something so you could                 |
| 19  | MR. LINN: I just wanted to make sure you              |
| 20  | were asking him questions.                            |
| 21  | MR. ALLEN: No, I am not.                              |
| 22  | MR. LINN: You were going back and forth               |
| 23  | and it appears the court reporter was not able to get |
| 24  | it down because she was marking an exhibit.           |

APPL- APP. 108

| 1   | MR. ALLEN: That is okay. I will tell you            |
|-----|---|
| 2   | what the conversation was about. Sean told me that  |
| 3   | he thought there were invoices in the 30 B 6        |
| 4   | deposition relating to Firestone. That was the      |
| 5   | extent of the conversation. Since those are already |
| 6   | in evidence, it's not relevant. We will just move   |
| 7   | on. Terry, are you still there?                     |
| 8   | MR. LINN: I am here. You know, I am just            |
| 9   | listening and objecting. I will cross examine when  |
| 10  | it's my turn.                                       |
| 11  | BY MR. ALLEN:                                       |
| 12  | Q Okay. Let's go into this briefly. Mr.             |
| 13  | Steimle, I am going to show you Page I will give    |
| 14  | you the Bates Number. ALP 00433, dated June 23,     |
| 15  | 2006. Which is a brochure, part of a brochure,      |
| 16  | generated by Portals Plus, and contained in         |
| 17  | Defendant's Exhibit Number 12 already in evidence.  |
| 1.8 | And I am going to ask you if you see the drawing at |
| 19  | the top of the page.                                |
| 20  | Terry, do you want to look for that?                |
| 21  | MR. LINN: Yes. I am just trying to get              |
| 22  | it. You said Defendant's Exhibit 12?                |
| 23  | MR. ALLEN: Yes. I will wait until you get           |
| 24  | it.   |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

AS HOLDINGS, INC.,

Plaintiff;

Opposition

-vsNo. 91182064

H&C MILCOR, INC. f/k/a
AQUATICO OF TEXAS, INC.,

Defendant.

The testimonial deposition of LARRY DEVITT, called by the defendant for examination, pursuant to notice and pursuant to the provisions of the Civil Practice Act of the State of Illinois and the Rules of the Supreme Court thereof pertaining to the taking of depositions for the purpose of evidence, taken before DEBORAH TYRRELL, a Certified Shorthand Reporter and a Notary Public within and for the County of DuPage and State of Illinois, at 815 Kimberly Drive, Carol Stream, Illinois, on the 12th day of November, 2009, at the hour of 12:30 p.m.

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|    | WITNESS: LARRY DEVITT 2   |
|----|---|
| 1  | APPEARANCES:  |
| 2  | AFFBARANCES:  |
| 3  | VAN DYKE, GARDNER, LINN & BURKHART, LLP.                        |
| 4  | (2851 Charlevoix Drive S.E. P.O. Box 888695                     |
| 5  | Grand Rapids, Michigan 49588-8695<br>Telephone: (616) 975-5503) |
| 6  | BY: MR. TERENCE J. LINN   |
| 7  | appeared telephonically on behalf of the plaintiff;             |
| 8  |   |
| 9  | LAW OFFICE OF DILLIS V. ALLEN                                   |
| 10 | (105 South Roselle Road<br>Suite 101                            |
| 11 | Schaumburg, Illinois 60193 Telephone: (847) 895-9100)           |
| 12 | BY: MR. DILLIS V. ALLEN   |
| 13 | appeared on behalf of the defendant.                            |
| 14 |   |
| 15 |   |
| 16 |   |
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APPL. APP. //2

|    | WITNESS: LARRY DEVITT 4                              |
|----|--|
| 1. | (Witness sworn.)                                     |
| 2  | LARRY DEVITT   |
| 3  | a witness herein, having been first duly sworn, was  |
| 4  | examined and testified as follows:                   |
| 5  | DIRECT EXAMINATION                                   |
| 6  | BY MR. ALLEN:  |
| 7  | Q State your full name and your address of           |
| 8  | business.  |
| 9  | A Lawrence M. Devitt. 815 Kimberly Drive,            |
| 10 | Carol Stream, Illinois.                              |
| 11 | Q I am going to show you a pipe boot that has        |
| 12 | been previously identified as Defendant's Exhibit 4  |
| 13 | and ask you whether you can recognize it and if you  |
| 14 | can tell me what it is?                              |
| 15 | A It appears to be a pipe boot that we               |
| 16 | manufactured for Firestone.                          |
| 17 | Q Now there is in evidence a specification           |
| 18 | that Firestone gave to the plaintiff AS Holdings for |
| 19 | the purpose of subcontracting a pipe boot for the    |
| 20 | benefit of Firestone. And in that specification      |
| 21 | there is a plurality of technical information and    |
| 22 | drawings. And I am going to hand you a Portals Plus  |
| 23 | document and ask if you can identify that for me?    |
| 24 | MR. LINN: Okay. I am going to object to              |

#### WITNESS: LARRY DEVITT 5 whatever that soliloquy was. Object to form; 1 2 leading; assumes facts not in evidence. And also 3 it's not by way of any kind of questioning. 4 just testimony. MR. ALLEN: Thank you. 5 THE WITNESS: Okay. This is a -- the page 6 7 you gave me is a page from what we commonly call our binder; our technical manual. And it shows three 8 different pipe boots on it that we manufacture. 9 10 The one probably most important here is what we call the medium pipe boot. Along with a 11 12 drawing indicating dimensions of heights, diameters, and diameter of the phalange of the pipe boot. 13 MR. LINN: 14 Mr. Allen, what document is that, please? 15 16 MR. ALLEN: It's a Portals Plus --17 THE WITNESS: Catalogue page. MR. ALLEN: Catalogue page. 18 19 MR. LINN: Is this a new thing? 20 I think it probably appears in MR. ALLEN: 21 one of the things that is already in there. 22 MR. LINN: Well, I will have an objection as to the extent that this is an document that is not 23 identified on defendant's pre-trial disclosures. 24

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|    | WITNESS: LARRY DEVITT 6                               |  |
|----|---|--|
| 1  | well as to the extent it hasn't been produced or      |  |
| 2  | otherwise identified to us. Again, can I have a       |  |
| 3  | continuing objection to any documents of that nature  |  |
| 4  | so that I don't have to keep interrupting you?        |  |
| 5  | MR. ALLEN: Yes, you can.                              |  |
| 6  | MR. LINN: Okay. Thank you.                            |  |
| 7  | MR. ALLEN: First of all, let's mark it.               |  |
| 8  | Mark it Defendant's Exhibit 19.                       |  |
| 9  | (Exhibit marked as requested.)                        |  |
| 10 | BY MR. ALLEN:   |  |
| 11 | Q I am going to hand 19 back to the witness.          |  |
| 12 | I am going to ask you if that document was            |  |
| 13 | transmitted to Firestone?                             |  |
| 14 | A Yes, it was.  |  |
| 15 | Q Thank you. Now I am going to hand you a             |  |
| 16 | three-page document, that includes a fax              |  |
| 17 | transmission, a Firestone Building Products EPDM Pipe |  |
| 18 | Boot page, and a letter that appears to go from Ron   |  |
| 19 | Resech at Portals Plus to Paul Oliveira at Firestone. |  |
| 20 | Can you identify those three documents?               |  |
| 21 | A Yes.  |  |
| 22 | MR. LINN: Mr. Allen, in addition to the               |  |
| 23 | continuing objection as to the extent it is a new     |  |
| 24 | documentation, I will also introduce an objection as  |  |

|    | WITNESS: LARRY DEVITT 7                               |
|----|---|
| 1  | to this being hearsay. Go ahead.                      |
| 2  | MR. ALLEN: Understood.                                |
| 3  | BY MR. ALLEN:   |
| 4  | Q Can you identify those documents?                   |
| 5  | A Yes. What these are, first of all, is a             |
| 6  | submittal that was made when we were beginning to do  |
| 7  | business with Firestone and that is why it is hard to |
| 8  | describe so someone else can see it. But this         |
| 9  | particular page that has a drawing of a pipe boot and |
| 10 | along again with some dimensions and whatnot and a    |
| 11 | little bit of description with Firestone's name on it |
| 12 | and the Portals Plus logo.                            |
| 13 | Q Who generated that document?                        |
| 14 | A Portals Plus did. Portals Plus generated            |
| 15 | it and sent it to at that time the purchasing agent   |
| 16 | at Firestone to give him an idea, a concept, of what  |
| 17 | it is that he is going to be buying.                  |
| 18 | Q All are all three of these documents                |
| 19 | produced in the regular course of business of Portals |
| 20 | Plus?   |
| 21 | A Yes. Yes, they are.                                 |
| 22 | Q Okay.   |
| 23 | A And the last one by the way was sending             |
| 24 | them samples to Paul Oliveira of our products.        |

23

24

|    | WITNESS: LARRY DEVITT 8                               |
|----|---|
| 1  | MR. ALLEN: Thank you. I hand it to the                |
| 2  | court reporter and ask that she mark that Defendant's |
| 3  | Exhibit 20.   |
| 4  | (Exhibit marked as requested.)                        |
| 5  | BY MR. ALLEN:   |
| 6  | Q I am handing you a set of documents that            |
| 7  | are entitled "Firestone Product Specification". It    |
| 8  | is a ten-page document. I am asking if you can        |
| 9  | identify that. And, if so, tell me what it is.        |
| 10 | A This is a copy of a Product Specification           |
| 11 | from Firestone for their white EPDM pipe boots, which |
| 12 | we also manufacture for them, and it includes         |
| 13 | specifications. The papers that you handed me also    |
| 14 | includes some emails that I had sent to Firestone     |
| 15 | with comments on the original copies of the           |
| 16 | specifications. Suggestions that I made to            |
| 17 | revisions. And the top copy is if you will a          |
| 18 | signature copy where various people at Firestone      |
| 19 | signed off on it as well as I did, too, for Portals   |
| 20 | Plus in reviewing it.                                 |
| 21 | MR. ALLEN: Thank you. I would hand it to              |
| 22 | the court reporter and ask that she mark it           |
|    |   |

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(Exhibit marked as requested.)

Defendant's Exhibit 21.

|    | WITNESS: LARRY DEVITT 9                               |
|----|---|
| 1  | BY MR. ALLEN:   |
| 2  | Q Now, could you summarize for us, Mr.                |
| 3  | Devitt, your post high school education?              |
| 4  | A Yes. It is Architectural. University of             |
| 5  | Illinois.   |
| 6  | Q Did you receive any kind of a degree or             |
| 7  | A Yes.  |
| 8  | Q award? What was it?                                 |
| 9  | A Bachelor of Architecture.                           |
| 10 | Q And can you give us your work first of              |
| 11 | all, how old a man are you approximately?             |
| 12 | A I am 65 approximately.                              |
| 13 | Q Can you give us like your work summary for          |
| 14 | just the last fifteen years?                          |
| 15 | A Gosh, that is actually pretty compact.              |
| 16 | Because in 19 beginning of 1996 I started with        |
| 17 | Portals Plus. So that takes us back thirteen years.   |
| 18 | Prior to that where was I? I was with a wholesale     |
| 19 | distributor in the Chicago area. A national           |
| 20 | distributor in the Chicago area. I have been in       |
| 21 | roofing in one form or another. Whether it is         |
| 22 | contracting, roofing consulting, investigating failed |
| 23 | roofs, designing new roofs, since about 1980.         |
| 24 | Q 1980?   |

# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| AS HOLDINGS, INC.         |  |
|---------------------------|--|
| Opposer, )                |  |
| v. )                      | Opposition No. 91182064                                |
| H&C MILCOR, INC. f/k/a    |  |
| AQUATICO OF TEXAS, INC. ) | Serial Number: 76/461,157                              |
| Applicant. )              | Mark: Miscellaneous Design: (Pipe Boot Product Design) |
| )                         |  |

#### **CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2010, a true and correct copy of Opposer AS Holding's Notice of Filing With Motions Attorney was sent via First Class Mail, postage prepaid to Attorney for Applicant as follows:

Dillis V. Allen 105 S Roselle Rd, Suite 101 Schaumburg, IL 60193

/Terence J. Linn/
Terence J. Linn